TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]89

JOSEPH H. SAMPLINER, PLAINTIFF IN ERROR,

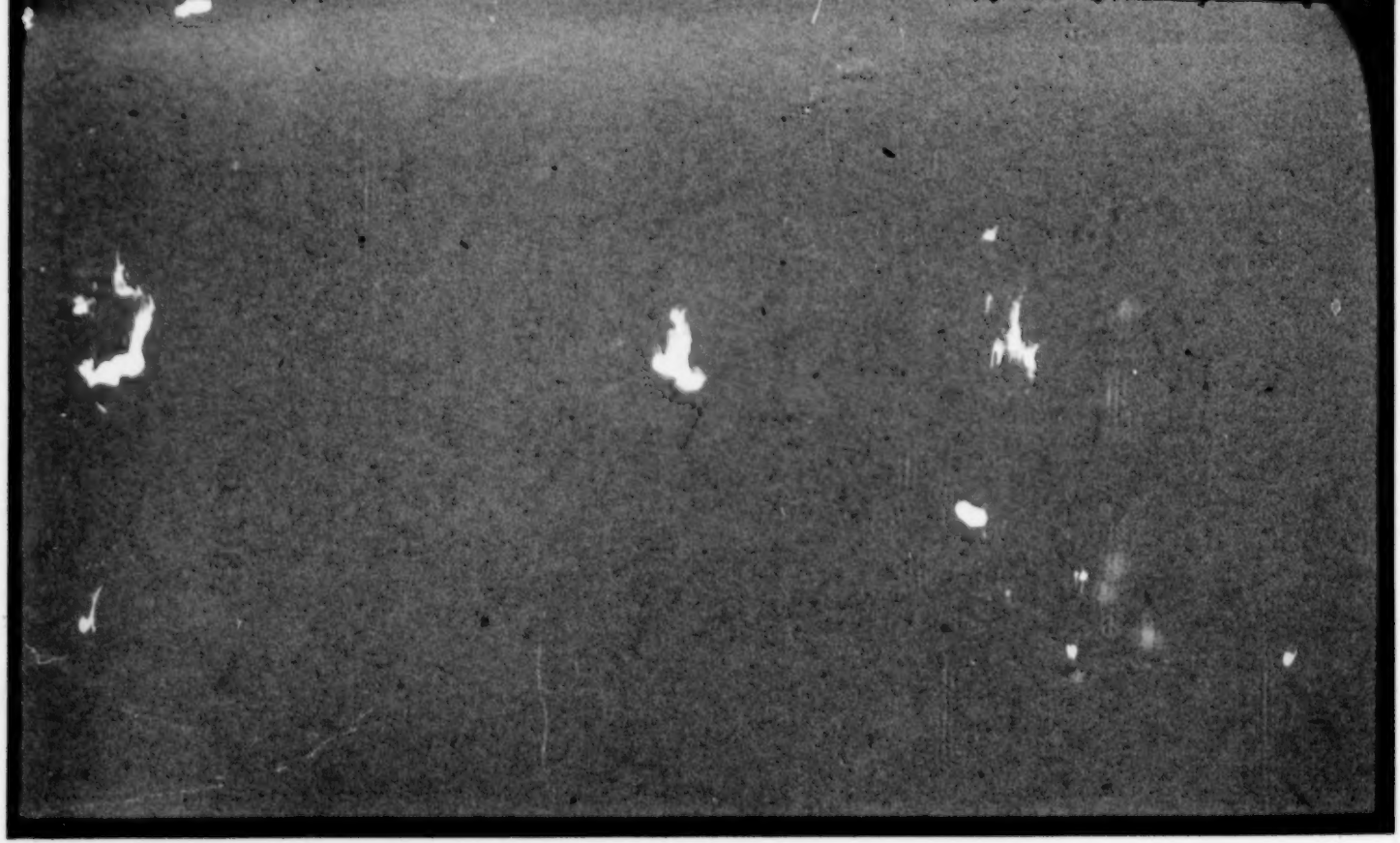
vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 31, 1920.

(27,896)



(27,036)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 340.

JOSEPH H. SAMPLINER, PLAINTIFF IN ERROR,

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript of record from the district court of the United States for the southern district of New York	1	1
Writ of error	1	1
Summons	3	2
Complaint	5	3
Answer of Pathé Frères	67	34
Answer of Percival Waters	88	45
Order granting separate trial on issue of champerty	104	53
Resetting order as to separate trial, &c	106	54
Minute entries	108	55
Motion to strike out, &c	109	55
Motion to direct verdict, &c	109	55
Motion for new trial	109	56
Execution stayed ninety days, &c	109	56
Order granting motion to amend judgment	110	56

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 7, 1920.

	Original.	Print.
Amended judgment	112	57
Motion to strike out from complaint, &c	117	59
Statements of counsel, &c	118	60
Testimony of William A. Sherman	128	65
Emanuel Mandelbaum	225	122
Joseph H. Sampliner	258	142
Motion to direct verdict, &c	303	168
Colloquy between court and counsel	303	168
Plaintiff's Exhibit 1—Assignment to plaintiff, dated December 28, 1911	312	172
2—Page 16 of minute book Lake Shore Film & Supply Co	313	173
3—Page 19 of minute book Lake Shore Film & Supply Co	314	173
4—(*Id.*) Deposition of William A. Sherman taken in Cleveland	316	174
5—Plaintiff's second bill of particulars as to services rendered as attorney, &c	339	188
6—Plaintiff's first bill of particulars	348	192
Notice as to bill of exceptions	361	199
Order settling bill of exceptions	364	201
Stipulation as to answers of other defendants	365	201
Assignment of errors	367	202
Petition for writ of error	472	258
Order allowing writ of error	474	259
Bond for damages and costs	475	259
Citation	481	262
Stipulation as to record	483	263
Clerk's certificate	484	263
Opinion, Rogers, J	485	264
Judgment	501	274
Petition for rehearing	503	275
Opinion on petition for rehearing	530	291
Order denying petition for rehearing	539	295
Petition for writ of error	540	295
Order allowing writ of error	542	296
Assignment of errors	543	297
Bond on writ of error	548	300
Clerk's certificate	551	304
Writ of error	552	304
Citation and service	555	306

United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error (Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters, Defendants-in-Error (Defendants Below).

TRANSCRIPT OF RECORD.

Writ of Error to the District Court of the United States for the Southern District of New York.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States, for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Joseph H. Sampliner, plaintiff; and Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters and William Pelzer, defendants, a manifest error hath happened, to the great damage of the said Joseph H. Sampliner, as is said and appears by his complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 29th day of January, 1918, that the record and proceedings aforesaid

2 being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 31st day of December, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

MANTON
Judge of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

ALEX. GILCHRIST, Jr.
Clerk of the District Court of the United States of America for the Southern District of New York, Second Circuit.

3 *Summons.*

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival Waters, William Pelzer, Defendants.

L16—175.

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

4 Witness, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 18th day of January, 1917.

[SEAL.] ALEXANDER GILCHRIST,
Clerk.

ROGERS & ROGERS,
Plaintiff's Attorneys.

Office and P. O. Address, No. 160 Broadway, Borough of Manhattan, New York City.

5 *Complaint.*

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival Waters, William Pelzer, Defendants.

The plaintiff, by Rogers & Rogers, its attorneys, complains of the defendant, and for his complaint herein, alleges:

First. That at all the times hereinafter mentioned, the Lake-Shore Film & Supply Company was a corporation, organized and existing under the laws of the State of Ohio, and had its principal place of business in the City of Cleveland, in the State aforesaid.

6 Second. That the defendants, or those hereinafter referred to in this Complaint, are as follows:

(*a*) Motion Picture Patents Company is a corporation organized under the laws of the State of New Jersey, but has an office and principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and can or will be found within the Southern District of New York.

(*b*) Vitagraph Company of America is and at all the times hereinafter mentioned has been a domestic corporation, organized under the Laws of the State of New York, having its principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and can or will be found within the Southern District of New York.

(*c*) Biograph Company is a corporation organized and existing under the Laws of the State of New Jersey, but has an office for the transaction of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and can or will be found within the Southern District of New York.

(*d*) Thomas A. Edison, Inc., is a foreign corporation, organized under the laws of the State of New Jersey, but has an office for the transaction of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and can or will be found within the said Southern District of New York.

7 (*e*) The Kalem Company is and at all the times hereinafter mentioned has been a domestic corporation, organized under the laws of the State of New York, having its principal place of business in the Borough of Manhattan, City of New York, in the Southern

District of New York, and can or will be found within the Southern District of New York.

(*f*) Pathe Freres is a foreign corporation, organized under the laws of the State of New Jersey.

(*g*) Lubin Manufacturing Company is a foreign corporation, organized under the laws of the State of Pennsylvania, having its principal office in Philadelphia, in the State of Pennsylvania.

(*h*) Gaston Melies, an individual, on information and belief, who is a non-resident of the State of New York, being domiciled or having residence abroad, but who has a duly constituted agent or attorney in fact, who can or will be found within the Southern District of New York.

(*i*) George Kleine is an individual manufacturer and importer, a resident of Chicago, Illinois.

(*j*) Essanay Film Manufacturing Company is a foreign corporation, organized under the laws of the State of Illinois, having its principal office in Chicago, in the State of Illinois.

(*k*) Selig Polyscope Company is a foreign corporation, organized under the laws of the State of Illinois, having its principal of-

8 fice in Chicago, in the State of Illinois.

Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, are either citizens of the State of New York, or have a residence in the Southern District of New York, or who can or will be found therein.

Gaston Melies has already been referred to above.

George Kleine is a resident of Chicago, in the State of Illinois.

Siegmund Lubin is a resident of Philadelphia, in the State of Pennsylvania.

William N. Selig and George K. Spoor are residents of the City of Chicago, State of Illinois.

Percival Waters is a resident of the Borough of Manhattan, City of New York, or can be found in the Southern District of New York.

Third. For the sake of brevity and definiteness, the following terms will be employed:

The term "licensed manufacturers" refers to the ten defendants, viz.: Essanay Film Manufacturing Company; Kalem Company; Lubin Manufacturing Company; Pathe Freres; Selig Polyscope Company; Vitagraph Company of America; Biograph Company (successors to the American Mutoscope & Biograph Company); Thomas A. Edison, Inc., (successor to Edison Manufacturing Company, after March, 1911), (and for acts prior to March, 1911, refer to the said Edison Manufacturing Company); George Kleine; and Gaston Melies.

The term "Executive Committee" refers to such committees of the General Film Company.

9 The individual defendants are owners, officers, directors or representatives of the licensed manufacturers, of the Motion Picture Patents Company and the General Film Company, excepting the defendant, Percival Waters, who was general manager of the General Film Company, at the times hereinafter mentioned.

"Patents Co." refers to defendant Motion Picture Patents Co.

As to such of the parties hereinbefore named who are made defendants in this suit, who cannot or are not found in the Southern District of New York, plaintiff expressly reserves the right to sue or proceed against them or any of them in such district in which they may reside or are found; this suit being instituted under the Act commonly known as the Federal Anti-Trust Act; plaintiff claims herein all of the rights and benefits conferred under the said Act, and particularly Sub-division 7 thereof.

Fourth. The Lake Shore Film and Supply Co., hereinafter referred to, was incorporated on or about July 22, 1908; from that time until on or about January 1st, 1912, it had been engaged in the business of dealing in positive motion picture films or subjects, and also in projecting machines and appliances, used, sold or leased, in connection with motion picture exhibitions.

Fifth. That prior to and since December 18th, 1908, its business has been conducted in the State of Ohio, States of Pennsylvania, Michigan and other States of the United States, and that it has shipped in transit from Ohio into other States and there has been shipped to it from States other than Ohio, motion picture film projecting machines and other goods and articles appurtenant to motion picture exhibitions; these shipments being not only between
10 it and its customers, but between it and the defendants "Licensed Manufacturers."

Sixth. That prior to on or about July 22, 1908, the Lake Shore Film & Supply Company freely dealt in the positive motion picture film, purchasing the same in the open market and was left free by the sellers thereof to deal with the same when and how it saw fit.

Seventh. That prior to said July 22, 1908, the defendants, who are herein designated as the "licensed manufacturers" or their predecessors, with the possible exception of Gaston Melies, were in open and free competition with one another; that there were open and competitive business dealings by and between them and the Lake Shore Film & Supply Co. and others.

Eighth. That at the time aforesaid, the positive motion picture film, the projecting machine, the appurtenances and appliances used in connection with motion picture exhibitions, were free and untrammelled; that the same was dealt in without any restriction of sale, lease or otherwise.

Ninth. That in or about the month of April, 1908, the defendants, now known or termed as "licensed manufacturers" or their predecessors as herein designated, were divided into two groups; one being known or designated as the "Edison group" of licensees, and the other as the "Biograph Group" of licensees. That the first mentioned group was formed or accomplished by the licensed manufacturers, other than the Biograph Company or its predecessors, George Kleine and Gaston Melies, combining together unlawfully;
11 and the "Biograph Group of Licensees" formed or accomplished by the Biograph Company or its predecessors, and George Kleine, combining unlawfully together.

Tenth. That upon the said two separate groups being formed, they entered into competition with each other, each bidding for the patronage of the Lake Shore Film & Supply Company as well as that of a large number of firms, individuals or corporations similarly engaged in business. That there was competition between and among the aforesaid manufacturers on the positive motion picture film, the projecting and exhibiting machines and the appurtenances or appliances used in connection with motion picture exhibitions.

Eleventh. That the defendants engaged in or constituting the group known as the Edison Licensees, in order to destroy competition between them, and to monopolize the commerce relating to the motion picture art, to exclude all others therefrom, agreed to carry on the business by means of the unlawful combination which they created in or about the month of April, 1908.

Twelfth. That the said combination was but a cloak and a cover under which to transact business unlawfully in the sale and commerce of motion picture film.

Thirteenth. That at all times hereinbefore mentioned, the defendants now termed the "licensed manufacturers" were engaged in interstate commerce and in shipping positive motion picture film, and some of them also projecting machines and the appliances therefor, in and between the several states.

12 Fourteenth. That on or about December 18th, 1908, there were engaged in the business of selling positive motion picture films and distributing them throughout the United States, the above named licensed manufacturers or their predecessors and also approximately (150) one hundred and fifty concerns similar to the said Lake Shore Film and Supply Company who were engaged in the business of renting or selling to theatres or exhibitors motion picture film, projecting machines and the appliances for giving motion picture exhibitions, and in so doing were engaged in interstate commerce, the manufacturers having many customers located in States other than the State in which they were situated and the rental companies having numerous customers located in States other than the State in which they were situated, and more particularly, the plaintiff had many and numerous customers situated in States other than the State of Ohio under the laws of which it was organized and in which State it had its place of business.

Fifteenth. At the time aforementioned, there was active competition in the manufacture and sale of projecting machines which were then sold by the Biograph Company, the Edison Manufacturing Company, the Armat Company or other manufacturers, and in addition to the film manufactured by the licensed manufacturers, there was foreign film imported by George Kleine aforementioned, George Melies Company or its successor.

Sixteenth. Prior to December, 1908, the said Lake Shore Film & Supply Co. and the other rental exchanges, freely bought, sold or

leased the films purchased by them outright from the manu-
13 facturers, and the rule or general custom was that the manufacturers sold the film to the plaintiff and other similar rental agencies on terms of bargain and sale, each transaction being governed by the circumstances thereof.

Seventeenth. In or about the Fall of 1908, the defendants or some of them, excepting the General Film Company (which was thereafter formed), conceived the purpose of acquiring by illegal means, or illegitimate methods, all of the patents relating to the motion picture art and for the purpose of driving out of business other companies or concerns then engaged in the business of manufacturing or leasing or dealing in motion picture film and projecting machines, and for the purpose of preventing all other companies or concerns from entering into such business, thereby suppressing and preventing the competition in said business and acquiring and maintaining a monopoly of the business in motion picture film, projecting machines and the appliances and appurtenances thereof, and thereafter successively formed the following combinations in corporate form, to wit: The Motion Picture Patents Company which was organized in the Fall of 1908, and The General Film Company, in or about April, 1908.

Eighteenth. That the Motion Picture Patents Company is a combination or company in corporate form owned by some of the defendants and controlled by all of the licensed manufacturers; that since its organization, the said corporation has acted in concert and
in co-operation with the defendant licensed manufacturers
14 and with the General Film Company, from and after its organization, for the purpose of monopolizing commerce relating to the motion picture industry; to exclude all persons other than the licensed manufacturer, from that art; for the purpose of permitting them to carry on commerce and motion picture film according to the terms of the unlawful combination created by it; and also created for the purpose of monopolizing the motion picture industry and the business therein in the interest of the licensed manufacturers, and for the purpose of driving out of business the then existing rental exchange of whom there were, as hereinbefore alleged at that time, approximately one hundred and fifty.

Nineteenth. That the General Film Company was, at the time herein named, a combination of the defendants licensed manufacturers owned and controlled by the said licensed manufacturers, formed for the purpose of permitting the licensed manufacturers in this combined form, to destroy competition between them and monopolizing commerce relating to the motion picture industry; to exclude others than the so-called licensed manufacturers from engaging or dealing in motion picture film, projecting machines and the appurtenances and appliances therefor, and for the purpose of driving out of business the rental companies existing at the time of its formation and to monopolize and to take unto itself the business of these rental companies who were at that time engaged in the purchase and leasing of

motion picture film, in interstate commerce, having many customers in the States other than those in which the rental companies were situated.

15 Twentieth. That since its formation, The General Film Company has been engaged in interstate commerce, shipping motion picture film, projecting machines and appliances thereof into States other than those in which it is situated and that the said General Film Company and its branches have and had many customers to whom it supplied and shipped film, situated in States other that those in which the General Film Company made its shipment from and from which it furnished the supply; and that the film leased by the General Film Company were and are in commerce and in transit from one State to the other from time to time.

Twenty-first. That during the latter part of the year 1908, the defendants formed or caused to be formed the Motion Picture Patents Company, which was to do no business, and hold no property other than certain Letters Patent which were to be transferred to it by the defendants and others. One of the objects, if not the chief object of the formation of the company was to acquire all the patents owned by the defendants and all of the patents relating to the motion picture industry.

Twenty-second. Upon the creation of the said company, all of the patents owned by the various defendants were assigned to the said holding or Patents Company, but upon the express condition and proviso that under certain contingencies, more particularly referred to in a written agreement simultaneously made between the owners of the patents and the said Patents Company, the patents
16 were to be re-assigned by the said Motion Picture Patents Company to the assignors thereof; the said agreements for the assignment of the patents having been executed simultaneously on or about December 18th, 1908.

Twenty-third. That while the said agreements purport to have been made with the Motion Picture Patents Company by the holders thereof, that it was for and in the interest and benefit of the combination of the said licensed manufacturers; that provision was in the said agreement made that a portion of the royalties to be collected under the said patents, to wit, 24% of the gross royalties collected from exhibitors was to be paid to the said defendants, licensed manufacturers. The Armat Company, which was a foreign corporation organized under the laws of the State of West Virginia, was also drawn into the combination, and there was also to be paid to it and the Licensed Manufacturers a portion of the royalties received or collected by the Patents Company, not only upon projecting machines which were to be thereafter sold, but also, as was thereafter practiced, by levying a toll or so-called "royalty" on projecting machines which had theretofore been purchased by the exhibitors and paid for by them outright, without any restriction as to use, or otherwise, and without any patent restriction ever having been im-

posed by the sellers thereof (among the sellers were the licensed manufacturers).

Twenty-fourth. The defendants, in pursuance of the plan and purposes under which the Motion Picture Patents Company
17 was formed, and with the intent thereby to suppress and eliminate competition and to support and protect the monopoly of the defendants, Motion Picture Patents Company and licensed manufacturers, and intending thereafter to create an agency or company such as the General Film Company was, and is, simultaneously with the assignment to the Motion Picture Patents Company of all the outstanding patents, some of which were competing, some of which were co-related, and others which were overlapping, thereupon and on the same date, to wit, on or about December 18th, 1908, entered into agreements with the licensed manufacturers, excepting the defendant Gaston Melies (who thereafter, and on or about July 10th, 1909, entered into the arrangement or combination by a similar agreement), which purported to be a license agreement made by the Patents Company to the manufacturers, as such, but which were in fact agreements outside of the patent or patent laws, and made for the purpose, not of protecting patent rights or claims, but for the purpose of and with the intent to suppress and eliminate competition, and to create, support and protect a monopoly by the defendants, licensed manufacturers, in and on positive motion picture film, projecting machines and the motion picture industry, and with the intent of monopolizing the entire motion picture industry, as well as the business of exhibiting motion picture and motion picture film.

Twenty-fifth. The licensed agreements referred to were, by agreement of the defendants, to be all alike, and it was provided and agreed among them that the terms of the said agreements were to be determined before the patents were assigned by them to
18 the new company to be formed, i. e., the Motion Picture Patents Company. It was further agreed among them that in these license agreement were to be incorporated conditions and restrictions not authorized by the patent laws, and regulating the conduct of the business of the licensed manufacturers in every detail. By these agreements the manufacturers were all to do business in exactly the same manner—they were to lease films and no longer to sell them—the price of which they were to be leased were to be uniform and non-competitive, and further, the manufacturers were to do business with only such of rental companies as should be licensed by the Patents Company aforesaid, and upon the further agreements to handle only the films manufactured by the defendants, and to sub-lease them only to exhibitors licensed by the Patents Company. No exhibitor was to be furnished film who did not agree not to display the films of any manufacturer other than the defendants, and not to use projecting machines not licensed by the Patents Company—it being defendants' intention, by virtue of these agreements to acquire the power to determine who should engage in the business as a manufacturer of films and who excluded therefrom—who should continue to operate a rental companies and whose busi-

ness should be destroyed; who should be or remain an exhibitor, and who should close his theatre;—and who should in the future open a new motion picture theatre, and who should be prevented from so doing.

Twenty-sixth. The intent of the defendants in forming the new company and entering into the so-called license agreements
19 was to control, restrain and monopolize all branches of commerce among the various States of the United States and with foreign agents, relating to the motion picture business and the motion picture art, and to exclude others therefrom.

Twenty-seventh. With the unlawful purposes aforementioned, the defendants, acting together, had or caused to be incorporated the Motion Picture Patents Company, under the laws of the State of New Jersey on or about September 8th, 1908. For greater particularity as to the articles of incorporation the plaintiff begs leave to refer to the same upon the trial hereof.

Twenty-eighth. Some of the provisions of the articles of incorporation are as follows: The capital stock was to be $100,000. The principal business of the corporation was as hereinafter set forth,—to acquire by purchase or otherwise letters patent, inventions, improvments and apparatus relating to the production of negatives and positives of motion pictures, and also relating to the photographing, developing, reproducing, projecting and exhibition of scenes and objects at rest and in motion, and to license others to use the inventions covered by the letters patent, and to use such improvements.

Twenty-ninth. On or about December 18th, 1908, with the unlawful purposes and intent aforementioned, the defendants attended at a meeting on or about December 18th, 1908, with the possible exception of the defendant, Gaston Melies, and there was simultaneously executed the following:
20 (1) Preliminary agreements for the assignment of the patents to the Patents Company.

(2) So-called license agreements by the nine licensed manufacturers hereinbefore referred to, with the Patents Company, one being issued by each of the manufacturers, excepting Gaston Melies.

Thirteenth. At the same time and day as had been previously agreed, the defendants elected as officers and directors of the Patents Company the following:

President—Frank L. Dyer, who at that time was also Vice-President of the defendant, Edison Manufacturing Company; Vice-President—Henry N. Marvin, who at that time was also Vice-President of the Biograph Company; Treasurer—Jeremiah J. Kennedy, who at that time was also President of the Biograph Company; Secretary—George Scull, attorney of and for the defendant, Edison Company.

Thirty-first. The Defendant, William Pelzer, during some of the time from December, 1908, to March, 1912, has been an officer and director of the said Patents Company, in place of the said George F.

Scull,—the said William Pelzer also being an officer of Thomas A. Edison, Inc.

Thirty-second. Upon information and belief, that these officers, that is to say, Dyer, Marvin, Kennedy, Scull and Pelzer, the last two acting interchangeably, have during the period from the Summer of 1908 up to and including June 1, 1912, and for some time thereafter, and from and since the incorporating of the said company
21 up to the time hereinbefore mentioned, constituted the entire Board of Directors of the Patents Company.

Thirty-third. The stock of the Patents Company aforesaid, with the possible exceptions of four shares held by the four directors, to qualify them as such, has been owned, since its organization, by Thomas A. Edison, Inc., or its predecessor, Edison Manufacturing Company, and the other half by the defendant, Biograph Company, or its predecessor, American Mutoscope & Biograph Company, as provided in the preliminary agreement for the assignment of the patents; and the stock further restricted by a deposit thereof with a Trustee.

Thirty-fourth. That the said the Motion Picture Patents Company aforesaid was created by the defendants solely for the purpose of carrying into effect the intent of forming a combination of patents as one of the methods of monopolizing interstate and foreign commerce pertaining to the motion picture art and that by the combination of the said patents or alleged patents, defendants sought to obtain the unlawful power which would come to them if all patents were assigned in one ownership.

Thirty-fifth. That the said Patents Company has never owned any property except the patents transferred to it by the defendants and which is provided in the agreement to be re-assigned in the event of breach of the terms of the agreement; if the Patents Company becomes bankrupt or ceases to do business; if it is dissolved
22 voluntarily or otherwise; if its charter is repealed; the said re-assignment to the Patents Company to be without consideration to the several defendants who owned and transferred them.

Thirty-sixth. That at the time of the formation of the said Patents Company and the assignment to it of the various patents, the defendants well knew that the principal patent upon which the defendants relied had been declared invalid by the courts; that several of the other patents were of no value to the art; that all of the defendants had been conducting their business in defiance of the so-called alleged patents or patent rights and severally declaring their invalidity; that the alleged owners or patentees had not prosecuted their rights under the patents or alleged patents, but allowed the same to be generally used for a number of years before the formation of the combination herein referred to and the complaint alleges, upon information and belief, that but for the formation of the combination the owners of the said patents or alleged patents would not have proceeded thereunder.

Thirty-seventh. That with full knowledge of the foregoing state and condition of the patents, with knowledge of the invalidity of the principal patent relied on, the defendants proceeded with the execution of the agreement hereinbefore referred to; these agreements took the form hereinafter set forth and all of them were executed at the same time, to wit:

1. The preliminary agreements for assignment of patents by the holders thereof to the Motion Picture Patents Company.

23 2. Agreements between the Patents Company and the licensed manufacturers.

3. Agreements between the Patents Company and the manufacturers of exhibiting or projecting machines.

Thirty-eighth. (*a*) That on or about December 18, 1908, agreements were made with the owners of the patents, embracing any and all patents that might or could have any relation to the industry, if indeed such patents or any of them were valid; and these agreements were made with Edison Manufacturing Company, to the business of which Thomas A. Edison succeeded; the defendant, Biograph Company (or the corporation transacting business which assumed the name of the Biograph Company); with the defendant, Vitagraph Company of America, and with the Armat Moving Picture & Machine Company, already referred to.

(*b*) These agreements were practically in the same form, carrying with them a reserved right in the ownership of the patent, under certain terms and conditions, to have the said patents re-assigned to the owners.

(*c*) Among some of the provisions in the Vitagraph agreements not contained in the other agreements, it was provided that the patents Company would not grant any license to manufacture projecting machines under any of the patents owned by it unless the person applying therefor would execute an agreement to manufacture and sell and exhibit projecting machines under the said Vitagraph Company's patents, whether or not such person would thereafter make use of any of the inventions covering said Vitagraph Company's patents or not. To the Vitagraph Company there was to be paid a so-called "royalty" of $1.00 on each machine containing the invention described in one of the Vitagraph Company's patents.

24

(*d*) Upon information and belief, there has been paid to the Vitagraph Company or received by it $100,000 and over, under this portion of said agreement.

Thirty-ninth. At the same time or day, to wit, December 18, 1908, as that upon which the agreements were made between the defendant, Patents Company and the others for the assignment of patents, the Licensed Manufacturers, excepting Gaston Melies simultaneously executed agreements identical in form and practically the same; that the terms of these "license" agreements had been in advance arranged for and agreed upon at conferences at which were present the defendants, licensed manufacturers, or representatives thereof, or some of them.

Thirty-ninth. (*a*) Among the provisions of the said agreements between the licensed manufacturers and the Patents Company, were provisions that film was to be used only on projecting machines selected or designated by the Patents Company; the raw stock film upon which the pictures were to be printed was to be purchased only from the Eastman Kodak Company, which in turn was to sell it to no other person excepting the licensed manufacturers; the Patents
25 Company was to collect alleged "royalties" of $2.00 per week from all exhibitors getting the film from the licensed manufacturers for us on projecting machines—this provision being enforced against the owners of projecting machines who had purchased and owned them outright before the said Patents Company was formed, and the sale of which had been made to the purchasers by the sellers thereof, without any restrictions whatever.

Fortieth. The agreements further provided that the licensed manufacturers thereafter would not sell motion picture film, but loan, lease or rent it through the rental companies, who were selected by the Patents Company, and not to lease it or dispose of it to anyone dealing in film which was not made or put out by one of the licensed manufacturers. In turn it was provided that the rental company should not sell, but only have the right to sub-let the motion picture film—the exhibitors thereof were to exhibit only on projecting machines selected or designated by the Patents Company, and on none others,—the rental companies were not to sub-let the film at a lower sub-rental price than that agreed upon in the agreement, and for a violation of any of the conditions, the manufacturer was to have immediate possession of the motion picture films.

Forty-first. Among other provisions in the agreement was one fixing a scale of minimum prices for the use of the positive motion picture film by the manufacturers to the rental company, with the farther provision for a change of the scale of minimum prices upon a vote of the majority of the licensed manufacturers, determined in the manner in the agreement provided for.

26 Forty-second. The "Licensed Manufacturers" were not to lease their commodity directly or indirectly at lower prices than mentioned in the agreement—the sub-leasing price was to be fixed by majority vote of the licensees—and other illegal, onerous and unreasonable conditions were exacted, among which were that the licensed manufacturers would not supply or lease the same to any person whom the Patents Company would direct should not be supplied, or to any person who might sub-let the film to persons using the same for the exhibition thereof on projecting machines not approved by the Patents Company or the use of which was no longer permitted by said Patents Company.

Forty-third. It was further agreed that no person excepting the nine licensed manufacturers hereinbefore mentioned should obtain the privilege to manufacture excepting by majority vote of the licensed manufacturers, in the manner provided for in the agreement. Then followed provisions with respect to the so-called "licensing"

of manufacturers of projecting machines, which will hereinafter be referred to. The termination of the agreement was fixed to be August, 1919.

Forty-fourth. With the defendant, George Kleine, an agreement was made by which he was permitted to import positive films, the amount, however, being limited to 3,000 running feet per week, and he in turn was limited to bringing in to this country only the film manufactured under two brands, to wit, "Gaumont" and "Urban."

Forty-fifth. Upon information and belief; that up to De-
27 cember, 1908, the said George Kleine had imported the films of nine or ten foreign manufacturers and the weekly importation of which was far in excess of 3,000 feet per week.

Forty-sixth. Upon information and belief; that by the agreement thus made with the manufacturers, and the agreement thereafter made with the rental companies, the importation of the foreign film, except to the extent of 3,000 feet per week, was prohibited and restricted, although at that time a fair percentage of the trade was in foreign imported film.

Forty-seventh. Thereafter a similar agreement was entered into with Gaston Melies, and one George Melies, for the importation of film—the foreign film not to exceed 1,000 feet of new subject per week, made in France by George Melies.

Forty-eighth. Thereafter an agreement was made with Gaston Melies by which he was to manufacture film under a similar agreement.

Forty-ninth. At the time of the making of the said agreements, the licensed manufacturers were manufacturing and importing 90 per cent. or over of the film used in the United States, so that there was brought into the combination the manufacturers and producers of ninety per cent. or more of the film made and distributed in the United States, and ninety-five per cent. or more of the projecting machines used in the United States.

Fiftieth. The defendants having by means of the Motion Pic-
ture Patents Company brought in the combination all of the
28 outstanding patents and by means of the so-called manufacturers agreement hereinbefore referred to, having brought into the combination all or substantially all of the manufacturers and importers of positive motion picture film, at the same time brought into the combination ninety-five per cent. (95%) or more of the manufacturers of projecting machines. This was accomplished by a so-called "license" agreement with the manufacturers of exhibiting machines.

Fifty-first. On or about December 18th, 1908, intending and for the purpose of further monopolizing the trade, devised a so-called "license" agreement between the Patents Company and each of the manufacturers of projecting machines in form this agreement fol-

lows substantially the provisions contained in the agreement between the Patents Company and the manufacturers.

Fifty-second. Generally, the provisions of these projecting machine agreements contain the restrictive provisions and interlocking conditions employed in the agreements between the Patents Company and the manufacturers. Among other provisions, the agreements provided that every exhibiting machine should be sold subject to condition; that it shall be used solely for exhibiting motion pictures selected or approved by the defendants, Patents Company, and Licensed Manufacturers. Every machine was to be sold subject to the condition that it shall be used only for and in connection with the films supplied by the licensed manufacturers. The agreement also fixed the prices at which the projecting machines were to be
29 sold. There was to be a uniform price by all of the manufacturers thereby preventing, hindering and making impossible all competition in interstate commerce between the various manufacturers of projecting machines as to prices and terms of sale of their respective machines. The effect was, and the purpose intended to be accomplished, of establishing uniform prices.

Fifty-third. The manufacturers of projecting machines who were thus brought into the combination represented all or nearly all of the persons, firms or corporations then engaged in the business of manufacturing projecting machines located in different states who were selling and shipping the projecting and exhibiting machines in interstate commerce throughout the United States. Among others who were brought into the combination were the following with whom agreements were all executed on or about the same day, to wit, January 7th, 1909:

Armat Moving Picture Company,
Endegraff Manufacturing Company,
Edison Manufacturing Company,
Enterprise Optical Manufacturing Co.
Lubin Manufacturing Company,
Nicholas Power,
Eberhard Schneider,
Selig Polyscope Co.,
Spoor & Company,
Vitagraph Company of America.

Fifty-fourth. Thereafter and on February 13th, 1909, a similar agreement was entered into with the American Moving Picture Machine Company and thereafter on April 20th, 1909, with the
30 American Mutoscope Company and Biograph Company, now called Biograph Company.

Fifty-fifth. That although these agreements were entered into subsequent to on or about December 18th, 1908, their form had been agreed upon before that day and the plan of bringing projecting machine manufacturers into the combination had been determined upon by the defendants at the same time as the agreements were contemplated and conceived as between the owners of the patents and

the Patents Company thereafter to be formed and the agreement between the Patents Company and the "licensed" manufacturers.

Fifty-sixth. The defendants having by the acts and agreements aforesaid, brought into the combination all the owners of the patents and all the film manufacturers and all of the manufacturers of projecting machines, and having previously conceived a plan of reaching out and controlling every branch of the motion picture industry which included the control of the rental companies and the exhibitors of motion pictures, and having previously determined to monopolize not only the manufacture of motion picture film but the lease and the exhibition thereof, proceeded with another step in completing the combination.

Fifty-seventh. The defendants having determined upon a uniform contract with the conditions hereinbefore named and having agreed that all of them would do business only upon the same terms
31 and conditions with the rental companies as the others were and would, and having the control of all or substantially all of the film manufactured in the United States, and that which was thereafter to be imported into the United States, called together the owners or representatives of the then existing rental companies early in January, 1909. Before these persons were called together, the defendants had already conceived the plan of getting these rental companies, who previously had been conducting their business in the manner in which they saw fit and without any restriction, into a position whereby thereafter the defendants license manufacturers could monopolize the business of the rental companies and with full knowledge that the custom then prevailing and still prevailing in the trade is that the users of the film get their supply from the rental companies in program form representing varied subjects of different makes.

Fifty-eighth. Having conceived the plan of monopolizing the business then engaged in by the rental companies and as a part thereof, the defendants put before the assembled owners of the rental companies and their representatives a so-called form of "license" agreement for signature, the defendants thereby intending to get the rental companies into a position whereby they would thereafter conduct their business in the manner regulated by the defendants and also thereby to afford the opportunity of thereafter driving them out of business.

Fifty-ninth. The form of agreement which the defendants
32 had put before the owners of the rental companies were all alike and similar in form.

Sixtieth. The rental companies and their representatives including the representative of the Lake Shore Film & Supply Company who were in attendance at the meeting, objected to the said agreement and the terms thereof, but were informed by the defendants that a combination had been formed of the manufacturers and importers and that the rental companies would be obliged to take the agree-

ments in that form or the manufacturers combined would, every and all of them, refuse to deal with the rental companies or to supply them with any film or projecting machines.

Sixty-first. At that time there was no source of supply; in any event no adequate source of supply of film or projecting machines excepting from defendants and the so-called licensees of the Patents Company.

Sixty-second. So that the rental companies were given the choice by the defendant of either accepting the agreements that they had prepared or going out of business entirely.

Sixty-third. That by January, 1909, the said Lake Shore Company had built up a business which had a valuable good will. It was a profitable company, earning many thousands of dollars per year, and without the supply of the motion picture film from the defendants, which was the business it was principally engaged in, it could obtain no other adequate supply, and would be
33 forced to discontinue its business, thereby losing its good will, the use of the film it had on hand, and the profits which the company was capable of earning.

Sixty-fourth. In order to coerce the rental companies, including the said Lake Shore Co., to enter into the uniform agreement, the so-called rental license agreement, defendants represented and promised that the same would continue for the duration of the patents, and that they would not be cancelled or terminated, if the rental companies, including the said Lake Shore Company, complied with the terms of the agreement and only after a hearing.

Sixty-fifth. Among other provisions it was provided in this uniform contract for the distribution of films to the rental companies, that no manufacturer or importer could thereafter lease or consign any films to rental companies which had not signed the so-called "license" agreement with the Patents Company; it was also provided on the Rental Exchange agreement that:

(1) They were not to buy, lease, or otherwise obtain any motion pictures other than "licensed" motion pictures, and to dispose of motion pictures only by sub-leasing under the conditions set forth in the contract.

(2). The rental company shall not sell or exhibit the motion pictures, but shall only sublet the same, and only to exhibitors who shall exclusively exhibit so-called "licensed" motion pictures.

34 (3) They shall not sell, rent or otherwise dispose of any "licensed" motion pictures to any person engaged in selling or renting motion picture films.

(4) They shall not sell or dispose of motion pictures to any person in the exhibition business who may have violated any of the conditions imposed by the defendants.

(5) They shall not sublet "licensed" motion pictures to any exhibitor unless a contract with said exhibitor satisfactory in form to the Patents Company is first executed, and unless each motion picture projecting machine on which the licensed motion pictures are to be used by such exhibitor is regularly licensed by the Motion Picture Patents Company and the license fees therefor have been paid. The license fee was $2.00 a week on every projector owned by the exhibitor.

(6) The rental company was required to mail to the Patents Company a list, giving the name of each exhibitor supplied with pictures by the rental exchange. The rental companies were thereafter not allowed to supply the same exhibitors; the latter were apportioned among the various companies, in effect preventing the rental companies from subleasing pictures to a new exhibitor until that exhibitor has received the approval of the Patents Company; by this provision the latter company was to be enabled to determine who should become an exhibitor.

(7) The Patents Company may terminate the agreement on fourteen days' notice to the licensee of its intention to do so, or
35 immediately on breach of any of its conditions.

(8) The licensee shall return to each licensed manufacturer on the first day of every month, commencing seven months from the first day of every month, commencing from the first day of the month on which the agreement is executed, an amount of positive film in running feet equivalent to that obtaining the seventh preceding month.

(9) Uniform leasing prices are provided in the agreement.

Sixty-sixth. The number of rental companies to which agreements were to be given were limited to such exchanges as were selected by the defendants, Patents Company and Licensed Manufacturers. Some of the rental companies were put out of business entirely by refusal of the defendants to enter into an agreement with them without which the manufacturers would not and did not deal with them—thereby cutting off their supply and forcing them to go out of business.

Sixty-seventh. After protesting against the form of the agreement and with the onerous terms thereon imposed upon the rental companies, a large number of them, including the said Lake Shore Co., having no alternative, were coerced and forced into signing the agreement.

Sixty-eighth. The effect of these agreements, after they were executed, was that the manner and the conduct of the business of the rental companies was entirely dominated and controlled by
35 the defendants. Among other things, the rental companies were deprived of competing with other rental companies, for they were limited in doing business in any other territory excepting that for which they were licensed or had their principal place of

business. They were prohibited from having any branches of their business; they were prohibited from supplying an exhibitor and customer who was supplied by another "licensed" rental company, and the field of their operation generally restricted, as is more fully set forth in the said agreement.

Sixty-ninth. Among other provisions in the agreement was one that each exhibitor dealing with the said Lake Shore Company and the other "licensed" rental companies should pay a so-called "royalty" of $2.00 per week on each projecting machine in use by the exhibitor. This toll or levy was exacted on projecting machines which the exhibitors had theretofore purchased and bought outright, without any restriction thereon, or without any so-called patent limitation.

Seventieth. Following the act of signing the agreement, the defendants compelled the said Lake Shore Company and the other licensed rental companies to account for and pay this $2.00 a week, for each customer supplied by it, whether or not the customer paid it to the rental company. The effect of this was that while in theory the exhibitor was to pay the $2.00 per week, it was in fact exacted from the rental companies, including the said Lake Shore Company.

37 Seventy-first. That since most of the exhibitors refused to pay this sum of $2.00 per week, the said Lake Shore Company was obliged to make these payments itself, and so during the period from 1909 to on or about March, 1911, the said Lake Shore Company has paid to the Motion Picture Patents Company or to the defendants, a sum approximating $25,000, to which the defendants and Patents Company were not entitled, and which sum, or a portion thereof, was distributed among the defendants, licensed manufacturers, and of the Patents Company and its stockholders.

Seventy-second. The said Lake Shore Company was obliged to deal with the manufacturers and to purchase from them a sum equal to $2,500 per month—was prohibited from dealing in the film made by any other manufacturer or imported by any other importer than the "licensees" of the Patents Company—was obliged to pay the manufacturers a stipulated, uniform price which was in excess of the fair and reasonable value of the same. That under the so-called arrangement of leasing, the said Lake Shore Company was obliged to pay to the defendants, Licensed Manufacturers, a sum per foot as fixed in the agreement, equal to, or in some cases in excess of the price at which the film had theretofore been sold outright, this upon information and belief. In this way the said Lake Shore Company has paid to the defendants a sum, from the year 1909 to about March 1st, 1911, approximately $40,000 more than the said Lake Shore Company would have been obliged to pay for the same if there were fair and unrestricted competition among the manufacturers.

38 Seventy-third. The penalty for failure of the rental companies, including the said Lake Shore Company, to observe the terms and conditions, so-called, of the agreement, was a cancellation or termination of its "license," which defendants not only threatened the rental companies with, but in numerous instances the

defendants cancelled the agreements of rental companies, advertised and gave wide publicity to its cancellation to the trade generally and to the exhibitors dealing with the rental company; manufacturers ceased making supply to the said cancelled "licensed" rental company, and the threat was continually held over the "licensed" rental companies, including the said Lake Shore Company, that if they conducted their business in any other manner than the conditions imposed by the defendants, that it would result in their meeting the same fate, and its licenses cancelled and compelling them to cease doing business altogether.

Seventy-fourth. To further the defendants' monopoly, and to insure a continuance thereof, the permission to the exhibitors to do business with the rental companies were revoked in large numbers. These revocations were widely published and advertised, and were used as a club to compel the exhibitors to do business only in the manner prescribed by the defendants, and prevent the rental companies to deviate or vary the terms or conditions imposed by them—however unwillingly they assumed them, and however onerous they were in their terms.

Seventy-fifth. The defendants further conspiring for the purpose of making their monopoly more absolute, had provided in the agreement for the return of film to the defendants within several months after the same was delivered to the rental companies, including the said Lake Shore Company. This arrangement the complaint alleges was for the purpose of getting the rental companies, including the said Lake Shore Company, to return the film which the said Lake Shore Company and the other rental companies had purchased outright and owned before the Patents Company was formed, or the agreements made. With that object in view, the defendants compelled the said Lake Shore Company to return to them motion picture film which the said Lake Shore Company had on hand and for which, upon information and belief, it had paid approximately $75,000, and which at the time of its return was of the aggregate value of at least $25,000, which defendants now have or should have in their possession, belonging to the said Lake Shore Company, and for which the defendants paid no consideration or value to the said Lake Shore Company.

Seventy-sixth. That excepting for the power which the defendants obtained over the said Lake Shore Company by the formation of the combination and the making of the agreements hereinbefore referred to, the defendants or none of them are or could have been in position to compel the said Lake Shore Company to return to them or any of them the aforesaid film, but which by virtue of the combination and power that the defendants obtained over the said Lake Shore Company, they thus compelled the said Lake Shore Company, against its will, to make the surrender or transfer.

Seventy-seventh. That by virtue of the agreements existing between the defendants and the said Lake Shore Company and the other rental companies, and by virtue of the rules and regu-

lations promulgated, the defendants succeeded in obtaining from the said Lake Shore Company and other companies from time to time, the names of the customers with which the said Lake Shore Company and the other rental companies dealt and by reason of the knowledge which the defendant, the Patents Company and the "licensed manufacturers" had of the quantity of film with which the said Lake Shore Company and the other rental companies dealt, were in position to arrange a plan whereby they could get a more absolute control by driving the rental company out of business and taking over to themselves the business in which these rental companies were engaged and the profits, or an increased profit, that they were making.

As a further step in the consummation of this plan, the defendants between on or about January 1st, 1909, and April, 1910, the "licensed manufacturers," through the instrumentality of the defendant, Patents Company, cancelled the agreements of a number of the rental companies and drove them out of business.

Seventy-eighth. With the intent to monopolize the rental company business and with the unlawful purpose of intending to drive out of business the then existing rental companies, the defendants by reason of the information that they possessed themselves with as aforementioned, approximated the amount that it would be necessary to acquire by purchase, the rental companies, excepting
41 those that they had theretofore put out of business or which they intended thereafter to drive out of business without purchase.

Seventy-ninth. Thereupon on or about April 18th, 1910, the defendants intending thereby to carry into execution the plan upon which they theretofore had determined, organized or caused to be organized a corporation known as the General Film Company under the laws of the State of Maine, first having incorporated such company under the laws of the State of New Jersey, perfected the Maine corporation with a capital stock of $2,000,000, preferred stock, which thereafter in March, 1911, was reduced to $1,000,000, having an issue of $800,000 preferred stock and $200,000 common stock. As originally incorporated and perfected, the voting rights was to be only in the common stockholders, all of which was to be owned in equal shares by the ten "licensed manufacturers" or the principal officer or stockholder thereof, and the profits of the said company divided among the ten manufacturers after payment of the dividends on the common and preferred stock.

Eightieth. Upon the incorporation of the General Film Company or shortly thereafter, $100,000 of the common stock was allotted among the various ten license manufacturers each, their representatives or principal stockholders so that each owned $10,000 thereof; the other $100,000 remained in the treasury and has never been issued.

42 Eighty-first. The officers and the directors of the said General Film Company, it was agreed in advance, should be composed of a representative of each of the ten licensed manufac-

turers, and only representatives of those companies were to be, and in fact only these were elected to that board. The ownership of the stock was further restricted by agreements simultaneously made by all the "Licensed Manufacturers" that they should be stockholders only so long as their agreements with the Patents Company were in force and if their "License" Agreement was cancelled they were to cease to be stockholders; and other restrictions imposed.

Eighty-second. Before the said General Film Company was organized it was determined between the defendant Patents Company that an agreement should be entered into between it and the said General Film Company when formed, which should grant to the said General Film Company all of the rights and privileges which had theretofore been extended to the then existing rental companies in addition thereto certain more favorable provisions which would give the General Film Company an advantage over the then existing license rental companies, permitting the said General Film Company to compete unfairly with them and to place the General Film Company in a commanding position in the rental field, thereby better enabling it to drive out of business the existing license rental companies, or to absorb them by purchase or otherwise.

43 Eighty-third. It was also determined as part of the conspiracy and plan on the part of the defendants before the General Film Company was organized, that every and all of the ten license manufacturers would (and did) enter into an agreement with the General Film Company when formed, by which the manufacturers would agree to give to the said General Film Company advantages over its other customers, to wit, the then existing rental companies; and by reason of these more favorable provisions and conditions place the General Film Company in a position, where it could monopolize the trade of the rental companies and drive them out of business, permitting the said General Film Company to unfairly compete with existing license rental companies, making it unprofitable for them to continue in business, or in any event compelling them perforce, of the position occupied by the General Film Company, under the arrangements and agreements, to yield to the demands and exactions of the General Film Company.

Eighty-fourth. By this agreement, among other things, it was provided that the profits of the General Film Company was to be ratably divided among the ten license manufacturers, after paying seven per cent. (7%) dividends on the preferred stock and twelve per cent. (12%) on the common stock, which latter stock was owned entirely by the license manufacturers.

Eighty-fifth. That the purpose of the General Film Company in its formation was a combination on the part of the
44 "licensed manufacturers" and Patents Company attempting in corporate form to accomplish, by and through their combination into the said General Film Company, a complete control and mastery over the business of renting and leasing film and to

drive the then existing rental companies including the said Lake Shore Company, out of business.

Eighty-sixth. It was provided that the capital of the General Film Company was to be supplied by the "licensed manufacturers;" it began and completed the transaction of its business and purposes by a contribution of $100,000 on the part of the licensed manufacturers in the purchase of the common stock and has made during the first two or three years of its existence apparently $1,000,000 a year and over on this initial investment of $100,000 which were in whole or in great part in reality the profits formerly earned by the rental companies.

Eighty-seventh. That at the time of the formation of the General Film Company, the licensed rental companies, including the said Lake Shore Company, had built up the business of the exhibition of motion pictures in the United States, so that the demand for the film and the projecting machines had increased many fold since the organization and combination of the defendants. That the good will in the business of the rental companies and particularly of the said Lake Shore Company had been built up long before the General Film Company was organized and that the rental companies, including the said Lake Shore Company, had a value far in
45 excess of the arbitrary value which the defendant, the General Film Company, had placed upon its business and which figure or estimate will be hereafter again referred to.

Eighty-eighth. Upon the organization of the General Film Company, the following were named as its first Board of Directors, to wit: Jeremiah J. Kennedy, President and Director of the General Film Company; President of the Biograph Company; Treasurer of the Motion Picture Patents Company;

George Kleine, Vice-President and Director of the General Film Company, and owning the business of George Kleine, one of the licensed manufacturers;

Samuel Long, Treasurer and Director of the General Film Company. President and Director of the Kalem Company;

William Pelzer, Secretary of the General Film Company; Secretary and Director of the Motion Picture Patents Co., and Director and Vice-President of Thomas A. Edison, Inc.;

Frank L. Dyer, Director of the General Film Company; President of the Motion Picture Patents Company; President of Thomas A. Edison, Inc., and formerly and up to on or about February 28th, 1911, Vice-President of the Edison Manufacturing Company;

Jacques A. Berst, Director of the General Film Company; Vice-President of Pathe Freres;

Albert E. Smith, Director of the General Film Company; Treasurer and Director of the Vitagraph Company of America;

Sigmund Lubin, Director of the General Film Company; President and Director of the defendant, Lubin Manufacturing Company;
46 George K. Spoor, Director of the General Film Company and President and Director of the Essanay Film Manufacturing Company;

W. N. Selig, Director of the General Film Company and President and Director of the Selig Polyscope Company;

Gaston Melies, Director of the General Film Company and owner of the business of the defendant, Gaston Melies.

Eighty-ninth. Upon the organization of the said General Film Company, although up to that time the defendants had refused to permit any other rental company to have a branch or numerous branches, the General Film Company was immediately licensed to have a number of branches so that it could at once enter actively into the field of competing with the then existing rental companies, including the said Lake Shore Company; the said General Film Company having determined what companies it would purchase and which should be put out of business without purchase, thereupon proceeded to carry into execution the plan perfected.

Ninetieth. It was determined by General Film Company its directors or executive committee, that the preferred stock of the company should be used in the acquisition of the then existing license rental companies to the extent of $988,800 and $2,480,000 was to be paid in cash and deferred payments. This was for the purpose of acquiring by purchase all the "licensed" rental companies.

Ninety-first. For the purpose of compelling the existing license rental companies, including the said Lake Shore Company, to
47 sell out to the General Film Company, on a plan which contemplated giving the existing rental companies a small percentage of the real value of their or its business, part of which was to be paid in preferred stock, a very small amount in cash and the balance in deferred payments extending over five years according to the schedule arrangement made in advance, the defendants, Patents Company, proceeded to cancel the license of such exchanges as were then in the way of the General Film Company.

Ninety-second. The "licensed manufacturers" discriminated in favor of the General Film Company in the distribution of their products in various and divers ways, making it less profitable for the competing license rental companies to do business.

Ninety-third. One of the provisions that the agreement exacted from the rental companies was a provision that the same might be terminated on fourteen days' notice with or without cause, and without a hearing, that being the construction which the Patents Company put upon that provision. By means of this provision in the agreement and under threats to invoke it and by other unlawful means, intimidation, coercion, up to August, 1910, a large number of rental companies were driven out of business by purchase or otherwise. After the defendant, by their acts and conduct hereinafter referred to, had succeeded in ruining the business of the said Lake Shore Company, by cancellation of its agreement and other
48 acts herein referred to and complained of, they continued their operations of driving from the field every one of the original rental companies herein referred to, so that up to about the middle of November, 1911, all of the said rental companies, excepting

the Greater New York Film Rental Company, hereinafter to be referred to were driven out of business by purchase or otherwise, and for which said defendant, General Film Company, expended the sum of $2,243,089 in cash and deferred payments, and approximately $794,800 in preferred stock, which is approximately the amount which the defendants had in advance determined as the price that they would obtain and acquire the so-called rental companies for.

Ninety-fourth. Upon information and belief, that during the month of August, 1910, and subsequent thereto, the defendants, intending as part of the plan and scheme heretofore referred to, to acquire the business of the said Lake Shore Company by purchase at a price fixed by the defendant, otherwise to ruin or destroy the business of the said Lake Shore Company, attempted to induce the said Lake Shore Company to sell its business and assets at a price greatly below what it was actually worth, and upon information and belief, under threats of cancellation of its agreement with the Patents Company, offered to purchase the business and good will of said Lake Shore Company for the fixed arbitrary sum of $42,000 which, upon information and belief plaintiff alleges was not more than one-half of the actual value thereof.

49 Ninety-fifth. That in addition to fixing the arbitrary price of $42,000, the defendants attempted to and did arbitrarily dictate the conditions upon which the said sum of $42,000 would be paid; a small part of which was to be paid in cash, a large portion in deferred payments extending over a period of five years, and a percentage of which was to be in preferred stock of the said General Film Company.

Ninety-sixth. That the said Lake Shore Company fearing that the power of the defendants would be used against it, and that its business would be ruined and its good will destroyed if it did not submit to the terms and exactions of the said defendants, under the threat of the cancellation of its agreement with the Patents Company, and upon the implied and threatened refusal upon the part of the licensed manufacturers by reason thereof, to deal with the said Lake Shore Company or supply it with motion picture film, without which it could not conduct its business, it first stated to the representatives of the defendants that the said sum of $42,000 would be accepted by the stockholders of the said Lake Shore Company if it could have the opportunity of having the terms set forth in a written agreement and have the opportunity of examining and considering the same. The representatives of the defendants agreed that the written instruments would be prepared and submitted to the officers of the said Lake Shore Company for submission to the stockholders thereof.

Ninety-seventh. That instead of submitting said written
50 agreement, or the delivery of an agreement executed or unexecuted, the defendants caused, on or about August 23, 1910, one J. W. Willis, who was acting as the representative of the defendants, General Film Company, to appear at the office of the said Lake Shore Company, at Cleveland, Ohio, aforesaid, under an

alleged power or rights to take possession of the business and assets of the said Lake Shore Company, and who proceeded to assume control over the business of said Lake Shore & Film Supply Company.

Ninety-eighth. That the said J. W. Willis purported to act and was acting under instructions or directions of the defendants, and particularly the defendant, Percival L. Waters, who was then the General Manager of the General Film Company, and whose acts were with the consent and authority of the said General Film Company.

Ninety-ninth. Upon information and belief, that it was about this time the defendants and particularly the defendant, General Film Company, advertised and caused to be advertised that the said General Film Company had succeeded to or acquired the business of the said Lake Shore Company.

One Hundredth. That the said Lake Shore Company requested of the defendants and particularly of the said General Film Company that before turning over its business to the said General Film Company or to the aforesaid J. W. Willis, as its representative, that an agreement or instrument showing the terms and con-
51 ditions of the said sale that the said General Film Company had agreed it would deliver, be so delivered before the assets of the said business of the said Lake Shore Company was turned over to the said General Film Company.

One Hundred First. That none of the defendants or the said General Film Company ever delivered such an agreement, and that by reason thereof the said Lake Shore Company refused to turn its business over to the defendants or to the said General Film Company.

One Hundred Second. That at or about the time mentioned there was another rental company, known as the United Film Company, operating in the same business and in practically the same way and in practically the same territory as the said Lake Shore Company.

One Hundred Third. That upon the refusal of the said Lake Shore Company to turn its business over and surrender possession of its assets, good will and business to the defendants or to the said General Film Company, the defendants, intending to ruin and destroy the said Lake Shore Company and deprive it of its business, its assets and its good will, as a part of the plan and scheme to effect these purposes, determined to acquire the business and assets of the said United Film Company and to use the same as a means of harassing and annoying the said Lake Shore Company and to accomplish its ruin and destruction, its good will and the value of its assets.

52 One Hundred Fourth. Upon information and belief, that as part of the said plan and scheme, defendants or some of them, falsely stated and represented to an officer or officers or representatives of said United Film Company that the said Lake Shore Company had sold its business to the said General Film Company.

One Hundred Fifth. That by reason, wholly or in great part, of the said representations so made, which were untrue and false, or by other fraudulent or oppressive means and methods, the defendants succeeded in inducing the said United Film Company to sell to the said General Film Company its business and turn its assets over to the said General Film Company.

One Hundred Sixth. That after the defendants and the said General Film Company acquired the said United Film Company and the business thereof, that it refused to complete the negotiations with the said Lake Shore Company and failed to carry out the agreement for the purchase of the said business of the Lake Shore Company.

One Hundred Seventh. That thereupon and thereafter the said General Film Company took possession of the business of the said United Film Company, at Cleveland, Ohio, aforesaid, and operated the same as a branch of the said General Film Company, engaging in inter-state commerce of, films, projecting machines, accessories and appurtenances of motion picture exhibitions, in the State of Ohio and in other States and unfairly and illegally competing with the said Lake Shore Company.

53 One Hundred Eighth. That as a further part of the plan and scheme to injure or destroy the said Lake Shore Company and deprive it of its business, its good will and emoluments thereof, the defendants and particularly the said General Film Company, notified the exhibitors and customers of the said Lake Shore Company in the State of Ohio and elsewhere that they were expected thereafter to deal with the said General Film Company, through the branch acquired and operated by the purchase or transfer of the said United Film Company; that the said exhibitors were threatened that the said Lake Shore Company would not be able to continue to give them a supply of films and that unless these exhibitors entered into business arrangements with the said defendant, General Film Company, instead of transacting their business through the said Lake Shore Company, that thereafter it would be too late for them to get service or in any event practical or satisfactory service from the defendant, General Film Company.

One hundred ninth. Thereafter the defendants and more particularly the said General Film Company caused rumors to be spread and information to be disseminated that the said Lake Shore Company would shortly have its agreement with the Patents Company cancelled and that it would be to the advantage of the said exhibitors to take their business from the said Lake Shore Company and give it to the defendant, General Film Company, and further threatening that if the exhibitors, after the warning, continued to do

54 business with the said Lake Shore Company, that if and when the agreement that the said Lake Shore Company had with the Patents Company was revoked, that such exhibitors who had continued doing business with the said Lake Shore Company

would be unable to get films or supplies from the defendants, Licensed Manufacturers.

One Hundred Tenth. That by reason of said representations, rumors and information so spread by the defendants and more particularly by the said General Film Company and its representatives, many of the customers and exhibitors of the said Lake Shore Company ceased to do business with the said Lake Shore Company and became the customers or patrons of the said General Film Company.

One Hundred Eleventh. That up to and on or about February 17, 1911, that the defendants through the instrumentality of the branch of the defendant, General Film Company, acquired by the aforesaid purchase or transfer from the United Film Company, engaged actively and unfairly in competition with the said Lake Shore Company; that the said unfair competition was encouraged, fostered and supported by all the defendants and that the exhibitors who were dealing with the General Film Company by reason thereof, were given superior advantages and opportunities over the customers and exhibitors dealing with the said Lake Shore Company, and that as a part of the plan and scheme to injure and destroy
55 the said Lake Shore Company and to make its business unprofitable, inducements were held out and threats to the customers and exhibitors dealing with the said Lake Shore Company to cease doing business with the said Lake Shore Company and become customers and patrons of the said defendant, General Film Company.

One Hundred Twelfth. That up to and on or about February 17, 1911, these practices and acts were continued and a commercial warfare was engaged in, directed against the said Lake Shore Company with the entire force and combined support of the defendants, by reason of which the business of the said Lake Shore Company, which was theretofore highly profitable, was made unprofitable, and it was prevented from doing the amount, and in fact a greatly reduced amount of business than it had theretofore been able to do. Its profits were decreased and diminished, all in the interest and for the benefit of the defendants.

One Hundred Thirteenth. That although before the execution of the agreement between the said Lake Shore Company and the Patents Company it had been represented by the defendants and particularly by the representatives of the Patents Company and the Licensed Manufacturers, that the said license agreement would not be cancelled excepting for a violation of the terms thereof, and despite the renewed representations of the aforesaid defendants or their representatives subsequently made; the defendants on
56 or about February 17, 1911, caused a notice in the following form to be sent to the said Lake Shore Company.

Motion Picture Patents Company,
80 Fifth Avenue, N. Y. City.
February 17, 1911.

The Lake Shore Film & Supply Company,
348 Superior Avenue,
Cleveland, Ohio.

GENTLEMEN:

Pursuant to the right reserved by this Company, under the first clause of Section 19 of the Conditions of Licenses, forming part of the Exchange License Agreement existing between you and this Company, and bearing date of the 14th day of January, 1909, we hereby notify you of our intention to terminate said license and that the same will terminate 8 o'clock A. M. Tuesday, the 7th day of March, 1911, unless sooner terminated by this Company for any breach of the Conditions of Licenses.

Yours truly,
MOTION PICTURE PATENTS COMPANY.
By W. P.

That the initials W. P. subscribed on the said letter are those of the defendant, William Pelzer.

One Hundred Fourteenth. That the said notice as aforesaid was intended to be and was an act on the part of the defendants to drive the said Lake Shore Company out of business; that the sending of the said notice and the act of termination of agreement
57 therein referred to was a part of the plan and scheme on the part of the defendants, preconceived and participated in by them; that it was an act on the part of all of the defendants, acting in their combined form and of the individual defendants as the principal stockholders or officers in their various interests, each making up the combinations hereinbefore referred to.

One Hundred Fifteenth. That immediately after the receipt of the said notice, aforesaid, the defendants, Licensed Manufacturers, refused to deal with the said Lake Shore Company, as it had theretofore dealt with them, the credit which had been extended by the said Licensed Manufacturers to the said Lake Shore Company was immediately withdrawn and the defendants made it impossible for the said Lake Shore Company to get a supply of the film manufactured or produced by the Licensed Manufacturers, without which it could not carry on its business.

One Hundred Sixteenth. That the refusal on the part of the said Licensed Manufacturers to deal with the said Lake Shore Company was intended by them to be one of the steps, and probably the final step, in attempting to drive the said Lake Shore Company out of business and to ruin and destroy its good will and its assets.

One Hundred Seventeenth. That upon the cancellation of the agreement between the said Lake Shore Company and the defendant, a large number of the largest customers and exhibitors
58 of the said Lake Shore Company immediately or practically at once ceased to do business with it; that the fact of the said

cancellation was widely advertised by the defendants, and as a result of which and the acts and conduct of the defendants, many of the customers and exhibitors of the said Lake Shore Company immediately or practically at once ceased doing business with the said Lake Shore Company.

One hundred eighteenth. That at the time of the formation of the said Lake Shore Company, in 1908, up to and about February 17, 1911, it had built up a large and profitable business, which upon information and belief had brought profits per year to the said Lake Shore Company of an average of $50,000 or more; that in building up the said business the said Lake Shore Company and its officers and representatives had laboriously worked, had expended large sums of money in advertising and had gone to great expense in creating a business intended to be permanent and profitable.

One hundred nineteenth. That as a consideration for the defendants, Licensed Manufacturers, supply to the said Lake Shore Company its supply of film up to and including August, 1919, the said Lake Shore Company had delivered to (without any present payment or consideration other than the agreement to supply said Lake Shore Company with the product of the Licensed Manufacturers so long as they should remain in business or up to August 19, 1919),
the Licensed manufacturers a quantity of motion picture
59 film from time to time during the period from 1909 up to on or about February, 1911, for which the said Lake Shore Company had paid, as heretofore alleged, upon information and belief, the approximate sum of $75,000, and which was at the time of said delivery thereof to the said defendants, Licensed Manufacturers, valued, upon information and belief, at approximately $25,000.

One hundred twentieth. That on or about the 17th day of February, 1911, the said Lake Shore Company had on hand motion picture film which, but for the cancellation of the agreement and the advertising of the defendants of the said cancellation and by the acts and conduct of the said defendants, was and would have reasonably been of the value of $40,000, and which said Lake Shore Company was prevented from using or marketing and the value of which was almost entirely, if not entirely, destroyed, to the damage of the said Lake Shore Company in the sum of $40,000.

One hundred twenty-first. That during a period of seven months, prior to February 17, 1911, the said Lake Shore Company had paid to the defendant, Licensed Manufacturers (in addition the payment of the sum of $2.00 per week, which was distributed between the defendants, Patents Company and the said Licensed Manufacturers, and some of which went to the individual defendants), a sum approximating $75,000 for motion picture film delivered by the said Licensed Manufacturers, and to the use of which the said Lake
Shore Company was entitled to for at least seven months
60 from the date of delivery thereof by the said Licensed Manufacturers to the said Lake Shore Company.

One hundred twenty-second. That by reason of the acts and conduct of the defendants, the said Lake Shore Company was deprived of the use of the said film for the period of at least seven months from the date of delivery thereof; that the defendants made it impossible for the said Lake Shore Company to rent or lease the same to their exhibitors and customers after the cancellation of the agreement; that the said exhibitors and customers, fearing that their business would be seriously interfered with and that the power of the said defendants would be used against them, refused to, or could not be induced, to handle the said films which the said Lake Shore Company had and for which it had paid the sum of $75,000 as aforesaid, to the damage of the said Lake Shore Company in the sum of approximately $50,000, being the average time less than seven months of which the said Lake Shore Company was deprived of the use thereof by the acts and conduct of the defendants as aforesaid.

One hundred twenty-third. That among the provisions hereinbefore referred to and by reason of the custom established by the defendants, the exhibitors who were dealing with the product of the defendants were prevented from dealing with any rental company or persons whose agreement with the Patents Company had been cancelled. This fact was well known and advertised in the trade and the exhibitors were so informed and understood that any
61 exhibitor or customer who dealt with a rental company whose agreement had been cancelled, by the Patents Company or the defendants, could not or would not get a supply thereafter from that made or marketed by the said Licensed Manufacturers.

One Hundred Twenty-fourth. That in order for the said Lake Shore Company or a rental company to successfully or practically carry on its business, it was necessary to have a weekly supply of the product made by the Licensed Manufacturers, and that the fact of discontinuing to supply the said Lake Shore Company with the newer releases and productions so that a proper program could be made up for the exhibitors of new subjects, as well as the old subjects which the said Lake Shore Company had on hand, made it impracticable and impossible for the said Lake Shore Company to carry on its business.

One Hundred Twenty-fifth. That by reason of the acts and conduct of the defendants and in order for the said Lake Shore Company to have proper guidance and as a necessary part of its business management because of the acts of the defendants directed against it, in carrying out the plan, scheme and conspiracy of the aforementioned, it became necessary for the said Lake Shore Company to be advised by counsel and to to have legal advice; that it have the benefit of lawyer or lawyers in the matter heretofore complained of, to the end that their rights might be protected, that they be
62 informed as to the proceedings against it and their legal rights in the controversy; that therefore, from on or about August, 1910, to about March 7th, 1911, the said Lake Shore Company did employ legal assistance and service, for which the said Lake Shore Company was obligated to pay the sum of approximately

$5,000, and in which further sum it has been damaged by the defendants.

One Hundred Twenty-sixth. That subsequent to February 17, 1911, and up to on or about November 14, 1911, the defendants, by purchase or otherwise, and by oppressive means and measures, acquired or drove out of business every other rental company excepting a company in New York City, known as the Greater New York Film Rental Company.

One Hundred Twenty-seventh. That at and subsequent to the 14th day of November, 1911, and thereafter, the defendant attempted to drive out of business the said Greater New York Film Rental Company as the sole remaining rental comp...ay competing with the said General Film Company, and that by various court proceedings and the action of the United States Government, hereinafter referred to, these actions and attempts on the part of the defendants to drive that remaining rental company out of business had not succeeded.

One Hundred Twenty-eighth. Upon information and belief that the commodity dealt in by the said Lake Shore Company and supplied by the defendants, Licensed Manufacturers, was not a patented article but was an unpatented article and subject to
63 the laws and statutes of the Federal Government, and the various States.

One Hundred Twenty-ninth. That the acts and conduct of the defendants was in violation of and contrary to the acts of Congress, approved July 2, 1890, known as the Sherman Anti-Trust Act, and violative of the provisions of the said Federal Anti-Trust Act as amended by the Act of Congress which became a law on the 15th day of October, 1914, known as the Clayton Law.

One Hundred Thirtieth. That on or about December 28, 1911, the said Lake Shore Company assigned to the plaintiff any and all of its claims for damages by it sustained by reason of the violation by the defendants and by or any of them of the Federal Anti-Monopoly Act and that the plaintiff became the owner by assignment from the said Lake Shore Company of any and all of its right, title and interest to any claim or claims against the defendants or any of them, by reason of the acts and conduct upon the part of the said defendants against the said Lake Shore Company, and is now the owner and entitled to sue and recover from the defendants and any of them for damages sustained by the said Lake Shore Company because of the combination in restraint of trade, monopolistic or other acts of conduct of the defendants or any of them against the said Lake Shore Company or suffered by the said Lake Shore Company.

One Hundred Thirty-first. That by reason of the acts and conduct of the defendant, hereinbefore enumerated and com-
64 plained of, the United States Government in the District Court of the United States for the Eastern District of Penn-

sylvania, began a suit in equity under the Federal Anti-Monopoly Act, entitled "United States of America v. Motion Pictures Patents Company, et al., including the defendants herein; that thereafter a decree was entered in the said Court on or about January 24, 1916, in favor of the said United States Government and against the defendants, the plaintiff claims the benefit of the provisions of the aforesaid United States Anti-Trust Law, known as the Clayton Law, making the same and the facts therein found prima facie evidence in this suit; plaintiff claims the full benefits of the said Clayton Law with respect to the decree—entered in favor of the Government in the so-called Sherman Anti-Trust Act suit against these defendants, or of any of them.

One Hundred Thirty-second. That the plaintiff expressly reserves unto himself the right to recover in this action or to separately proceed against the defendants for damages suffered by reason since the enactment of the said Clayton Law, amending the so-called Sherman Anti-Trust Act of 1890 and under the said act or either or both of them.

One Hundred Thirty-third. That by reason of the combinations, a combination, the agreement or agreements, the plan or plans, the act or acts and the conduct of the defendants and the practices engaged in by them and the matter hereinabove set forth, the said Lake Shore Company was injured in its business up to on
65 or about December 28, 1911, to the extent of approximately $250,000; that by reason thereof, by laws of the Statute made and provided, to wit, An Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act, and the Act of Congress of April 12, 1914, amending the said Sherman Anti-Trust Act, Section 7 thereof, the plaintiff claims to be entitled to recover three-fold from the defendants, or the sum of $750,000 as damages, together with a reasonable attorney's fee and the costs and disbursements of this suit.

Wherefore, by reason of the combination and combinations, the agreement and agreements, the plan or plans, the operation or operations and the act or acts of the defendants, and the premises herein set forth, the plaintiff's assignor has been injured in its business and property to the extent of $250,000, whereby, by force of the statute in such cases made and provided, to wit, the Act of July 2, 1890, commonly known as the Sherman Anti-Trust Act, Section 7 thereof, the plaintiff demands judgment three-fold from the defendant in the said sum of $250,000 as damages, making the three-fold sum of $750,000 as damages, together with a reasonable attorney's fee and also the costs and disbursements of this suit.

ROGERS & ROGERS,
Attorneys for Plaintiff.

Office and P. O. Address, 160 Broadway, Borough of Manhattan, City of New York.

66 *Verification to Complaint.*

UNITED STATES OF AMERICA,
State of Ohio,
County of Cuyahoga, ss:

Joseph H. Sampliner, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the complaint herein and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOSEPH H. SAMPLINER.

Sworn to before me this 16th day of January, 1917.
H. A. CUMMINGS,
Notary Public.

Notary Certificate, Clerk of Court of Common Pleas, Cuyahoga County, State of Ohio.

67 *Answer.*

In the District Court of the United States for the Southern District of New York

L.16—175.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival Waters, William Pelzer, Defendants.

Defendant, Pathé Freres, answering the complaint herein, by Coudert Brothers, its attorneys,

I. Denies each and every of the allegations contained in the paragraphs of the complaint herein numbered respectively Sixth, Seventh, Eighth, Eleventh, Twelfth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-first, Twenty-third, Twenty-fourth, Twenty-
68 fifth, Twenty-sixth, Twenty-seventh, Twenty-ninth, Thirty-second, Thirty-fourth, Forty-fourth, Forty-sixth, Forty-seventh, Forty-eighth, Forty-ninth, Fiftieth, Fifty-first Fifty-second, Fifty-fifth, Fifty-sixth, Fifty-seventh, Fifty-eighth, Fifty-ninth, Sixtieth, Sixty-first, Sixty-second, Sixty-third, Sixty-fourth, Sixty-sixth,

Sixty-seventh, Sixty-eighth, Sixty-ninth, Seventieth, Seventy-first, Seventy-second, Seventy-third, Seventy-fourth, Seventy-fifth, Seventy-sixth, Seventy-seventh, Seventy-eighth, Seventy-ninth, Eighty-first, Eighty-second, Eighty-third, Eighty-fifth, Eighty-sixth, Eighty-seventh, Eighty-ninth, Ninetieth, Ninety-first, Ninety-second, Ninety-third, Ninety-fourth, Ninety-fifth, Ninety-sixth, Ninety-seventh, Ninety-eighth, Ninety-ninth, One Hundredth, One Hundred Third, One Hundred fourth, One Hundred fifth, One Hundred Sixth, One Hundred Seventh, One Hundred Eighth, One Hundred Ninth, One Hundred Tenth, One Hundred Eleventh, One Hundred Twelfth, One Hundred Fourteenth, One Hundred Fifteenth, One Hundred Sixteenth, One Hundred Seventeenth, One Hundred Nineteenth, One Hundred Twentieth, One Hundred Twenty-second, One Hundred Twenty-third, One Hundred Twenty-fourth, One Hundred Twenty-fifth, One Hundred Twenty-sixth, One Hundred Twenty-seventh, One Hundred Twenty-eighth, One Hundred Twenty-ninth, One Hundred Thirty-first, One Hundred Thirty-third.

II. Denies, on information and belief, each and every of the allegations contained in the subdivision marked (*h*) of the paragraph numbered "Second" of the complaint herein, and defendant
60 alleges on information and belief, that Gaston Melies died at Ajaccio, Island of Corsica, France, on or about the 27th day of April, 1915.

III. Denies, on information and belief, that Frank L. Dyer, Percival Waters, Jacques A. Berst and William Pelzer are owners, officers, directors or representatives of the licensed manufacturers, the Motion Picture Patents Company, the General Film Company, or any of them, as alleged in the paragraph numbered "Third" of the complaint herein, and denies that "the individual defendants are owners, officers, directors, or representatives of the licensed manufacturers of the Motion Picture Patents Company and the General Film Company," as alleged in said paragraph.

IV. Denies any knowledge or information thereof sufficient to form a belief as to each and every of the allegations contained in the paragraphs numbered "Fourth" and "Fifth" of the complaint herein, except that defendant admits that the Lake Shore Film and Supply Company "has shipped in transit from Ohio into other States and there has been shipped to it from States other than Ohio, motion picture film."

V. Denies each and every of the allegations contained in the paragraph numbered "Ninth" of the complaint herein, except that this defendant admits "that in or about the month of April, 1908, the defendants, now known or termed as 'licensed manufacturers' or their predecessors * * * were divided into two groups; one being known or designated as the 'Edison group' or licensees, and the other as the 'Biograph group' or licensees."

70 VI. Denies each and every of the allegations of that portion of the paragraph numbered "Tenth" of the complaint herein

reading as follows: "That upon the said two separate groups being formed, they entered into competition with each other, each bidding for the patronage of the Lake Shore Film and Supply Company as well as that of a large number of firms, individuals, or corporations similarly engaged in business," and this defendant alleges that the licensed manufacturers were at all times in competition as individuals and not in groups and this defendant alleges that they are still carrying on such individual competition.

VII. Denies, on information and belief, each and every of the allegations contained in the paragraph numbered "Thirteenth" of the complaint herein, except that this defendant admits the licensed manufacturers shipped positive motion picture film in and between the several States and one of them shipped projecting machines in and between the several States.

VIII. Denies each and every of the allegations contained in the paragraph numbered "Fourteenth" of the complaint herein, except that this defendant admits that on or about December 18, 1908, the licensed manufacturers with the exception of George Kleine were manufacturing positive motion pictures and distributing them throughout the United States and that there were at that time approximately one hundred and fifty concerns engaged in the business of renting motion pictures to theaters or exhibitors and
71 renting and selling motion pictures and projecting machines and that the manufacturers had many customers located in the states other than the states in which they were situated and the rental agencies had customers located in the states other than the states in which they were situated.

IX. Denies each and every of the allegations contained in the paragraph numbered "Fifteenth" of the complaint herein, except that this defendant admits that on or about December 18, 1908, the Edison Manufacturing Company and other manufacturers were making and selling projecting machines in active competition and at said time there was foreign film imported by George Kleine, and this defendant alleges, on information and belief, that neither the Armat Company nor the Biograph Company ever sold projecting machines.

X. Denies each and every of the allegations contained in the paragraph numbered "Twentieth" of the complaint herein, except that this defendant admits "that the said General Film Company and its branches have and had many customers to whom it supplied and shipped film, situated in states other than those in which the General Film Company made its shipments from and from which is furnished the supply."

XI. Denies each and every of the allegations contained in the paragraph numbered "Twenty-second" of the complaint herein, except this defendant admits that certain patents were transferred

to the Motion Picture Patents Company by two of the de-
72 fendants herein on or about December 18, 1908, upon the express condition and proviso that under certain contingencies, more particularly referred to in a written agreement simultaneously made between the owners of the patents and the said Patents Company, the patents were to be re-assigned by the said Motion Picture Patents Company to the assignors thereof.

XII. Denies the allegation contained in the paragraph numbered "Twenty-eighth" of the complaint herein, that the articles of incorporation of the Motion Picture Patents Company provided for the acquisition of apparatus relating to the production of negatives and positives of motion pictures.

XIII. Denies each and every of the allegations contained in the paragraph numbered "Thirtieth" of the complain herein, except that this defendant admits that on December 18, 1908, the persons therein named were elected officers and directors of the Motion Picture Patents Company, and this defendant alleges that the said officers and directors of the said Company were elected by the directors thereof, without the aid, knowledge or participation of any of the defendants herein except Frank L. Dyer, Harry N. Marvin and Jeremiah J. Kennedy.

XIV. Denies each and every of the allegations contained in the paragraph numbered "Thirty-fifth" of the complaint herein, except that this defendant admits that the Patents Company never owned any property except patents, and this defendant alleges that
73 no patents were transferred to the Patents Company by the defendants herein except the Vitagraph Company of America and the American Mutuscope and Biograph Company (now Biograph Company), and begs leave to refer to the agreements by which said patents were transferred for greater certainty.

XV. Denies each and every of the allegations contained in the paragraph numbered "Thirty-sixth" of the complaint herein except that this defendant admits that each of the defendants, licensed manufacturers, had been conducting their business in defiance of one or more patents prior to December 18, 1908.

XVI. Denies each and every of the allegations contained in the paragraph numbered "Thirty-seventh" of the complaint herein, except that this defendant admits that preliminary agreements for the assignments of patents and agreements between the Patents Company and the licensed manufacturers with the exception of Gaston Melies were executed on the same day.

XVII. Admits that on or about the 18th day of December, 1908, certain agreements were entered into by the Motion Picture Patents Company with the Edison Manufacturing Company, the Biograph Company, the Armat Moving Picture Company and the Vitagraph Company of America, but this defendant denies each and every other of the allegations contained in the paragraph numbered "Thir-

ty-eighth" of the complaint herein, and this defendant begs leave to refer to said agreements for greater certainty.

71 XVII. Denies each and every of the allegations contained in the paragraphs of said complaint numbered "Thirty-ninth-a," "Fortieth," "Forty-first," "Forty-second" and "Forty-third," and begs leave to refer to the agreements therein mentioned for greater certainty.

XIX. Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraph numbered "Forty-fifth" of the complaint.

XX. Denies each and every of the allegations contained in the paragraphs numbered "Fifty-third" and "Fifty-fourth" of the complaint herein, except that this defendant admits that agreements were executed by and between the Motion Picture Patents Company and the corporations, firms and individuals therein mentioned on or about the dates therein alleged, and begs leave to refer to the agreements therein referred to for greater certainty.

XXI. Denies each and very of the allegations contained in the paragraph numbered "Sixty-fifth" of the complaint herein and begs leave to refer to the agreement therein referred to for greater certainty.

XXII. Denies each and every of the allegations contained in the paragraph numbered "Eightieth" of the complaint herein, except that this defendant admits that each of the licensed manufacturers or its representative owned $10,000 of the common stock of
75 the General Film Company and this defendant begs leave to refer to an exemplified copy of the Charter of the General Film Company and the amendments thereof for greater certainty.

XXIII. Denies each and every of the allegations contained in the paragraph numbered "Eighty-fourth" of the complaint herein, and this defendant alleges that it was provided in contracts between the General Film Company and the licensed manufacturers that, after paying from its net earnings a dividend of seven (7) per cent. on its preferred stock and a dividend of twelve (12) per cent. on its common stock as provided by the Charter of said General Film Company, all excess net earnings should be divided annually among the licensed manufacturers supplying the General Film Company with motion picture film in the proportion in which the number of feet of film supplied by each manufacturer might bear to the aggregate amount of film supplied by all of the manufacturers, and this defendant begs leave to refer to said contract for greater certainty.

XXIV. Denies the allegation of the paragraph numbered "Eighty-eighth" of the complaint herein, that Samuel Long was elected Treasurer of the General Film Company.

XXV. Denies each and every of the allegations contained in the paragraph numbered "One hundred first" of the complaint herein except the allegation that none of the defendants ever delivered such an agreement as is referred to therein, to said Lake Shore Company.

XXVI. Denies each and every of the allegations contained in the paragraph numbered "One hundred second" of the complaint herein, except that this defendant admits that the United Film Company was conducting a licensed rental exchange in the City of Cleveland, Ohio, in or about the month of August, 1910.

XXVII. Denies each and every of the allegations contained in the paragraph numbered "One hundred thirteenth" of the complaint herein, except that defendant admits that a notice in the form therein set forth was sent to said Lake Shore Film and Supply Company and that the initials "W. P." subscribed to said notice are the initials of the defendant William Pelzer.

XXVIII. Denies any knowledge or information thereof sufficint to form a belief as to each and every of the allegations contained in the paragraph numbered "One hundred eighteenth" of the complaint herein.

XXIX. Denies any knowledge or information thereof sufficient to form a belief as to the aggregate amount paid to the defendants, licensed manufacturers, for motion picture film by said Lake Shore Company and this defendant denies each and every other of the allegations contained in the paragraph numbered "One hundred twenty-first" of the complaint herein.

XXX. Upon information and belief this defendant denies each and every of the allegations contained in the paragraph numbered "One hundred thirtieth" of the complaint herein, and this
77 defendant alleges, upon information and belief, that the plaintiff is not the real party in interest therein.

Further answering the complaint herein, this defendant alleges:

XXXI. That in order to make and exhibit motion pictures successfully it is necessary to have a motion picture camera, a motion picture film and a motion picture projecting machine.

XXXII. That in 1889 Thomas A. Edison invented a motion picture camera and the motion picture film. Each was patented by him. This patent by successive reissues became respectively Reissues No. 12,037 and No. 13,329 for Kinetoscope, and Reissue No. 12,192 for Kinetoscopic Film. These patents, which were assigned by Thomas A. Edison to the Edison Manufacturing Company, will be hereinafter referred to as the Edison patents.

XXXIII. That subsequently to 1889, and prior to 1907, Woodville Latham made an invention relating to cameras and projecting

machines, and Thomas Armat and C. Francis Jenkins, John A. Press and Albert E. Smith made inventions relating to projecting machines, which were respectively patented by the inventors. Such patents will be referred to respectively hereinafter as the Latham patents, the Armat patent, the Press patent and the Smith patent.

XXXIV. That in the beginning of the year 1908 the Edison patents were owned by the Edison Manufacturing Company, the Latham and Press patents by the American Mutoscope and
78 Biograph Company, the Armat patent by the Armat Moving Picture Company and the Smith patent by the Vitagraph Company of America. The Edison reissue patent No. 12,037 for a camera had been litigated in a number of suits and had been held valid and infringed by various forms of cameras. The Armat patent had been litigated and held valid and infringed by a projecting machine. The inventions of the Edison, Latham, Armat, Press and Smith patents were being used without the license of their owners by all manufacturers of motion pictures, all manufacturers of projecting machines, all rental exchanges and all exhibitors of motion pictures. There was not and never has been any motion picture art which did not use the inventions of some or all of these patents.

XXXV. That in the early part of 1908 the Edison Manufacturing Company granted licenses under its patents to a number of producers of motion pictures. The American Mutoscope and Biograph Company likewise granted licenses under the Latham patent to a number of importers of motion picture film. In the year 1908 and previous thereto, numerous suits for infringement of said patents were begun and continued by the respective owners thereof, against others in the business. All of this litigation was being vigorously prosecuted in the year 1908.

XXXVI. That in the summer of 1908 every manufacturer of projecting machines was making and selling them in infringement of one or more of the projecting machine patents above referred to.

79 XXXVII. That the inventions embodied in each of these projecting machine patents were essential to a successful projecting machine.

XXXVIII. That the owner of any one of these essential projecting machine patents was in a position to prevent the manufacture of any projecting machine.

XXXIX. That there was no one engaged in the motion picture art or business at that time who could practice the art or any branch of it without infringing, either directly or by contribution, some or all of the Edison, Armat, Latham, Press or Smith patents.

XL. That the owners of the Edison, Latham, Armat, Press and Smith patents agreed upon a plan for freeing the art from litigation and the danger of litigation and under which the art could be law-

fully practiced. In conformity with this plan the Motion Picture Patents Company was incorporated under the laws of the State of New Jersey, and on December 18, 1908, there were assigned to it the Edison patents, the Latham patent, the Armat patent, the Smith patent and the Pross patent by the respective owners of said patents. The capital stock of the Motion Picture Patents Company was, and at all times since its incorporation has been, divided equally between the Edison Manufacturing Company or Thomas A. Edison, Inc., and the Biograph Company, which is the present name of the corporation, originally known as the American Mutoscope & Biograph Company.

80 XLI. That the Motion Picture Patents Company granted to all of the producers and to the principal importers then engaged in the production and importation of motion picture films, licenses under said patents and in January, 1909, it offered to all of the responsible rental exchanges in the United States licenses under said patents. This license was accepted by a large number of rental exchanges, but at no time have all of the rental exchanges in the United States been operating under the licenses of defendant Motion Picture Patents Company.

XLII. That early in 1909 licenses under said patents were offered to, and accepted by, substantially all of the manufacturers of projecting machines in the United States.

XLIII. That licenses under said patents were also offered to, and accepted by, a large number of exhibitors of motion pictures, though many refused such licenses.

XLIV. That these licenses were granted to the respective licensees under the patents held and owned by the defendant, Motion Picture Patents Company, and embodies reasonable and legal conditions and restrictions. That each of the patents heretofore enumerated covered inventions essential and necessary to the conduct of the business of the licensees.

XLV. That royalties were derived from these licenses which were distributed to the former owners of the patents.

81 XLVI. That certain producers of motion pictures, manufacturers of projecting machines, rental exchanges and exhibitors continued to carry on their respective businesses profitably in infringement of the patents owned by defendant, Motion Picture Patents Company, and the number of persons so engaged and the volume of their business has steadily increased since December 18, 1908, and is now greater in volume than the aggregate business of the licensed manufacturers.

XLVII. On information and belief, that after granting licenses to rental exchanges defendant, Motion Picture Patents Company, found that many of them were not performing the covenants and stipulations thereof and thereupon terminated the licenses of some of them for such non-performance and breaches thereof.

XLVIII. That the business of the licensed manufacturers and the revenues of defendant, Motion Picture Patents Company, were curtailed in development and growth by reason of neglect of many of the rental exchanges to observe the conditions of their licenses and foster the progress of the art.

XLIX. That the General Film Company was incorporated in April, 1910, and thereafter licensed by defendant Motion Picture Patents Company under its patents to conduct an exchange business and from time to time thereafter various branches of the General Film Company had been established by that company and licensed by defendant Motion Picture Patents Company.

82 L. On information and belief, that from time to time since its incorporation, the General Film Company has acquired the stocks of motion pictures of various exchanges upon fair terms, said stocks of film having been offered to the General Film Company and the purchase of the rights therein urged upon the General Film Company by the owners thereof.

LI. That no lawful business was carried on in the motion picture art prior to December 18, 1908, and no lawful business thereafter during any of the times thereafter specified in plaintiff's complaint except under Motion Picture Patents Company's licenses.

LII. That prior to the invention of said patentees there was no motion picture art.

LIII. That the inventions of said patentees created the motion picture art.

LIV. On information and belief, that all of the acts and agreements of defendant, Motion Picture Patents Company, and its licensees were lawful and were in the exercise of the patent monopoly granted by the United States to the respective patentees under said patents and duly transferred by them to the defendant, Motion Picture Patents Company.

LV. That none of the patents transferred to defendant, Motion Picture Patents Company, by the said patentees were competing, but each covered an essential and independent invention in the practice of the motion picture art.

83 LVI. On information and belief, that all licenses issued and granted by defendant, Motion Picture Patents Company, to rental exchanges were determinable at any time upon notice at the option of the defendant, Motion Picture Patents Company.

LVII. That defendant has not entered into any conspiracy or combination, nor has defendant entered into any conspiracy or combination in restraint of trade or in restraint of interstate or foreign commerce, nor has defendant entered into any conspiracy to injure or destroy the plaintiff's business, or to interefere in any way with the business of the plaintiff or of any rental agencies, as alleged in the complaint herein, nor has defendant entered into any conspiracy to prevent the plaintiff or any corporation or person from continu-

ing in business or to prevent the enjoyment thereof, and this defendant alleges that all the acts, arrangements, dealings and contracts referred to in the complaint herein were a reasonable, valid and legal exercise of the rights, powers and freedom to contract of the corporation defendants and did not exceed or go beyond the exclusive rights granted by the patents hereinbefore referred to and were within the dominion thereof.

LVIII. That this defendant never entered into any conspiracy to injure or interfere with plaintiff in any way.

Further answering the complaint herein, this defendant alleges:

84 LIX. That motion pictures are a literary, artistic and dramatic product; that the producer sells or leases performing rights in dramatic productions to rental exchanges and rental exchanges in turn sub-lease performing rights to exhibitors.

LX. That the value of each motion picture depends upon its originality, artistic excellence, distinct individuality and its difference in subject, theme or lesson from all other motion pictures.

LXI. That the reel of film which is sent by the producer of motion pictures to the rental exchange and in turn by the rental exchange to the exhibitor is merely the vehicle or medium for the carriage of the motion picture written thereon by photographic processes.

LXII. That none of the motion pictures leased by the licensed manufacturers, defendants herein, subsequent to December 18, 1908, had been surrendered into the public domain, and this defendant did not enter into any contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, and this defendant has not monopolized, or attempted to monopolize, or combined or conspired with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, and this defendant has not entered into any contract, combination in form of trust or otherwise, or conspiracy in restraint of interstate trade or commerce.

85 For a further separate and distinct defense, this defendant alleges, on information and belief:

LXIII. That neither of the alleged cats or omissions of the defendant set forth in the complaint occurred within six years prior to the date of the commencement of this action, and that none of the alleged cause or causes of action arose or accrued within six years next preceding the date of the commencement of this action.

For a further separate and distinct defense, this defendant alleges:

LXIV. Upon information and belief, that the plaintiff is and at the time of his alleged purchase of the claims in controversy, set up in the complaint herein, was an attorney and counselor-at-law of the State of Ohio, practicing as such before the Courts of that State.

LXV. Upon information and belief, that at the time of said alleged purchase, it was, and is now, the law of the State of Ohio that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such demand by such purchase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the State of New York.

86 LXVI. Upon information and belief, that the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon.

Wherefore, this defendant demands judgment that the complaint herein be dismissed, with costs.

COUDERT BROTHERS,
Attorneys for Defendant.

Office and Post Office Address, 2 Rector Street, Borough of Manhattan, New York City, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Paul Fuller, Jr., being duly sworn, deposes and says that he is President of Pathé Frères, one of the defendants herein, which is a foreign corporation, organized under the laws of the State of New Jersey; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters therein stated to be alleged on information, and as to those matters he believes it to be true; that the ground of deponent's belief as to all matters not therein stated of his own knowledge, are statements made to him by other officers, agents and representatives of the said defendant corporation and general information of the business in which the said defendant corporation is engaged.

87 That the reason why this verification is not made by the defendant is that the defendant is a corporation.

PAUL FULLER, Jr.

Sworn to before *me* this 24th day of February, 1917.
[SEAL.] JOHN HENRY MOTTOLA,
Notary Public.

88 *Answer.*

In the District Court of the United States for the Southern District of New York.

L16—175.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival Waters, William Pelzer.

Defendant, Percival Waters, answering the complaint herein, by Dwight MacDonald, his attorney:

1. Denies each and every of the allegations relating to this defendant, either separately or jointly with one or more of the other defendants, contained in the paragraphs of the com-
89 plaint herein numbered respectively: Seventeenth, Eighteenth, Twenty-first, Twenty-second, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-ninth, Thirtieth, Thirty-fourth, Thirty-sixth, Thirty-seventh, Fiftieth, Fifty-fifth, Fifty-sixth, Fifty-seventh, Fifty-eighth, Fifty-ninth, Sixtieth, Sixty-first, Sixty-second, Sixty-fourth, Sixty-sixth, Sixty-eighth, Seventieth, Seventy-second, Seventy-third, Seventy-fourth, Seventy-fifth, Seventy-sixth, Seventy-seventh, Seventy-eighth, Seventy-ninth, Eighty-third, Eighty-seventh, Eighty-ninth, Ninety-third, Ninety-fourth, Ninety-fifth, Ninety-eighth, One Hundred Thirty-first.

2. Denies that he has any knowledge or information thereof, sufficient to form a belief, as to the allegations contained in the paragraphs of the complaint herein numbered respectively: Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Sixty-third, Sixty-fifth, Sixty-seventh, Seventy-first, Ninety-sixth, Ninety-seventh, ninety-ninth, One Hundredth, One Hundred First, One Hundred Third, One Hundred Fourth, One Hundred Fifth, One Hundred Sixth, One Hundred Eighth, One Hundred Ninth, One Hundred Tenth, One tenth, One Hundred Fourteenth, One Hundred Fifteenth, One Hundred Sixteenth, One Hundred Seventeenth, One Hundred Eighteenth, One Hundred Nineteenth, One Hundred Twentieth, One Hundred Twenty-first, One Hundred Twenty-second, One Hundred Twenty-third, One Hundred Twenty-fourth, One Hundred Twenty-fifth, One Hundred Twenty-sixth, One Hundred

Twenty-seventh, One Hundred Twenty-eighth, One Hundr
89 Twenty-ninth, One Hundred Thirtieth, One Hundr
Thirty-third.

3. Denies, on information and belief, each and every of the allega
tions contained in the sub-division marked (h) of the paragraph o
the complaint herein numbered "Second" and this defendant a
leges, on information and belief, that Gaston Melies died at Ajacc
Island of Corsica, France, on or about the 27th day of April, 1915.

4. Denies, on information and belief, that Frank L. Dyer, Perci
Waters, Jacques A. Berst and William Pelzer are owners, office
directors or representatives of the licensed manufacturers, the Mot
Picture Patents Company, the General Film Company, or any o
them, as alleged in the paragraph of the complaint herein numbere
"Third," and denies that "the individual defendants are owner
officers, directors or representatives of the licensed manufacture
of the Motion Picture Patents Company and the General Film Co
pany," as alleged in said paragraph, and that the defendant Perci
Waters was General Manager of the General Film Company at th
times thereinafter mentioned as alleged in said paragraph, an
alleges that this defendant became General Manager of the Gener
Film Company for the first time on or about May, 1910.

5. Denies the allegation contained in the paragraph of the co
plaint herein numbered "One Hundred Seventh" that the Gener
Film Company operated the United Film Company of Cleveland
Ohio, unfairly or illegally competing with the said Lake Shore Co
pany.

91 6. Alleges that this defendant never entered into any co
spiracy to injure or interfere with plaintiff in any way.

Further answering the complaint herein, this defendant

7. Alleges that in order to make and exhibit motion pictures su
cessfully it is necessary to have a motion picture camera, a motio
picture film and a motion picture projecting machine.

8. Alleges that in 1889 Thomas A. Edison invented the motio
picture camera and the motion picture film. Each was patented b
him. This patent by successive reissues became respectively Reissu
No. 12,037 and No. 13,329 for Kinetoscope, and Reissue No. 12,19
for Kinetoscopic Film. These patents, which were assigned by Thoma
A. Edison to the Edison Manufacturing Company, will be hereinafte
referred to as the Edison patents.

9. Alleges that subsequently to 1889, and prior to 1907, Woodvill
Latham made an invention relating to cameras and projecting ma
chines, and Thomas Armat and C. Francis Jenkins, John A. Pros
and Albert E. Smith made inventions relating to projecting ma
chines, which were respectively patented by the inventors. Such
patents will be referred to respectively hereinafter as the Latham
patent, the Armat patent, the Pross patent and the Smith patent.

10. Alleges that in the beginning of the year 1908 the Edison patents were owned by the Edison Manufacturing Company, the Latham and Press patents by the American Mutoscope and Biograph Company, the Armat patent by the Armat Moving Picture Company and the Smith patent by the Vitagraph Company of America. The Edison reissue patent No. 12,037 for a camera had been litigated in a number of suits and had been held valid and infringed by various forms of cameras. The Armat patent had been litigated and held valid and infringed by a projecting machine. The inventions of the Edison, Latham, Armat, Press and Smith patents were being used without the license of their owners by all manufacturers of motion pictures, all manufacturers of projecting machines, all rental exchanges and all exhibitors of motion pictures. There was not and never has been any motion picture art which did not use the inventions of some or all of these patents.

11. Alleges that in the early part of 1908 the Edison Manufacturing Company granted licenses under its patents to a number of producers of motion pictures. The American Mutoscope and Biograph Company likewise granted licenses under the Latham patent to a number of importers of motion picture film. In the year 1908 and previous thereto, numerous suits for infringement of said patents were begun and continued by the respective owners thereof, against others in the business. All of this litigation was being vigorously prosecuted in the year 1908.

12. Alleges that in the summer of 1908 every manufacturer of projecting machines was making and selling them in infringement of one or more of the projecting machine patents above referred to.

13. Alleges that the inventions embodied in each of these projecting machine patents were essential to a successful projecting machine.

14. Alleges that the owner of any one of these essential projecting machine patents was in a position to prevent the manufacture of any projecting machine.

15. Alleges that there was no one engaged in the motion picture art or business at that time who could practice the art or any branch of it without infringing, either directly or by contribution, some or all of the Edison, Armat, Latham, Press or Smith patents.

16. Alleges that the Motion Picture Patents Company was incorporated under the laws of the State of New Jersey, and on December 18, 1908, there were assigned to it the Edison patents, the Latham patent, the Armat patent, the Smith patent and the Press patent by the respective owners of said patents. The capital stock of the Motion Picture Patents Company was, and at all times since its incorporation has been, divided equally between the Edison Manufacturing Company, or Thomas A. Edison, Inc., and the Biograph Company, which is the present name of the corporation, originally known as the American Mutoscope & Biograph Company.

94 17. Alleges the Motion Picture Patents Company granted to all of the producers and to the principal importers then engaged in the production and importation of motion picture films, licenses under said patents and in January, 1909, it offered to all of the responsible rental exchanges in the United States licenses under said patents. This license was accepted by a large number of rental exchanges, but at no time have all of the rental exchanges in the United States been operating under the licenses of defendant Motion Picture Patents Company.

18. Alleges that early in 1909 licenses under said patents were offered to, and accepted by, substantially all of the manufacturers of projecting machines in the United States.

19. Alleges that licenses under said patents were also offered to, and accepted by, a large number of exhibitors of motion pictures, though many refused such licenses.

20. Alleges that these licenses were granted to the respective licensees under the patents held and owned by the defendant, Motion Picture Patents Company, and embodied certain conditions and restrictions. That each of the patents heretofore enumerated covered inventions essential and necessary to the conduct of the business of the licensees.

21. Alleges that royalties were derived from these licenses which were distributed to the former owners of the patents.

95 22. Alleges that certain producers of motion pictures, manufacturers of projecting machines, rental exchanges and exhibitors continued to carry on their respective businesses profitably in infringement of the patents owned by defendant, Motion Picture Patents Company, and the number of persons so engaged and the volume of their business has steadily increased since December 18, 1908, and is now greater in volume than the aggregate business of the "licensed manufacturers."

23. Alleges on information and belief, that after granting licenses to rental exchanges defendant, Motion Picture Patents Company, found that many of them were not performing the covenants and stipulations thereof and thereupon terminated the licenses of some of them for such non-performance and breaches thereof.

24. Alleges on information and belief that the business of the licensed manufacturers and the revenues of defendant, Motion Picture Patents Company, were curtailed in development and growth by reason of neglect of many of the rental exchanges to observe the conditions of their licenses and to foster the progress of the art.

25. Alleges that the General Film Company was incorporated in April, 1910, and thereafter licensed by defendant Motion Picture Patents Company under its patents to conduct an exchange business and from time to time thereafter various branches of the
96 General Film Company have been established by that company and licensed by defendant Motion Picture Patents Company.

26. Alleges on information and belief, that from time to time since its incorporation, the General Film Company has acquired the stocks of motion pictures of various exchanges the purchase of the rights therein being with the voluntary consent of the owners thereof.

27. Alleges that no business was carried on in the motion picture art prior to December 18, 1908, except in violation of some of the licenses above referred to and without violating said licenses, no business was carried on thereafter during any of the times thereafter specified in plaintiff's complaint, except under Motion Picture Patents Company's licenses.

28. Alleges that prior to the inventions of said patentees there was no motion picture art.

29. Alleges that the inventions of said patentees created the motion picture art.

30. Alleges on information and belief, that the acts and agreements of defendant, Motion Picture Patents Company, and its licensees were in the exercise of the patent monopoly granted by the United States to the respective patentees under said patents and transferred by them to the defendant, Motion Picture Patents Company.

31. Alleges on information and belief that none of the patents transferred to defendant, Motion Picture Patents Company, by the said patentees were competing, but each covered an essential and independent invention in the practice of the motion picture art.

32. Alleges on information and belief, that all licenses issued and granted by defendant, Motion Picture Patents Company, to rental exchanges were determinable at any time upon notice at the option of the defendant, Motion Picture Patents Company.

33. Alleges that this defendant has not entered into any conspiracy or combination, nor has this defendant entered into any conspiracy or combination in restraint of trade or in restraint of interstate or foreign commerce, nor has this defendant entered into any conspiracy to injure or destroy the plaintiff's business, or to interfere in any way with the business of the plaintiff or of any rental agencies, as alleged in the complaint herein, nor has this defendant entered into any conspiracy to prevent the plaintiff or any corporation or person from continuing in business, or to prevent the enjoyment thereof.

34. Alleges that this defendant never entered into any conspiracy to injure or interfere with plaintiff in any way.

Further answering the complaint herein, this defendant

35. Alleges that motion pictures are a literary, artistic and dramatic product; that the producer sells or leases performing rights in dramatic productions to rental exchanges and rental exchanges in turn sub-lease performing rights to exhibitors.

36. Alleges that the value of each motion picture depends upon its originality, artistic excellence, distinct individuality and its difference in subject, theme or lesson from all other motion pictures.

37. Alleges that the reel of film which is sent by the producer of motion pictures to the rental exchange and in turn by the rental exchange to the exhibitor is merely the vehicle or medium for the carriage of the motion picture written thereon by photographic processes.

38. Alleges that none of the motion pictures leased by the licensed manufacturers, defendants herein, subsequent to December 18, 1908, had been surrendered into the public domain, and this defendant did not enter into any contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, and this defendant has not monopolized, or attempted to monopolize, or combined or conspired with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, and this defendant has not entered into any contract, combination in form of trust or otherwise, or conspiracy in restraint of interstate trade or commerce.

For a further separate and distinct defense, this defendant

39. Alleges that on or about the year 1900, this defendant became a dealer in motion picture films and accessories and estab-
99 lished a business in the City of New York.

40. Alleges that thereafter this defendant developed the said business, particularly the purchase of motion picture films from manufacturers and makers thereof and the leasing of such films to motion picture theaters throughout the eastern part of the United States and prior to the year 1910 had built up a large business.

41. Alleges that during the entire period from 1900 to 1910 this defendant, at various times, was a customer of the "licensed manufacturers" and bought from each of these manufacturers or makers of motion picture films large quantities of their product on the usual terms and conditions under which other customers of said manufacturers conducted businesses similar to that of the defendant.

42. Alleges that during this entire period there were no relations between this defendant and said "licensed manufacturers" other than those of purchaser and seller.

43. Alleges that in the year 1908, desiring to continue to secure for his customers, the theatres he was supplying, the motion picture films manufactured by the "licensed manufacturers," this defendant became a licensee of the Edison Company under its patents, and as such licensee on satisfactory terms and conditions continued the conduct of his business without any interference or interruption.

100 44. Alleges that in the year 1909 this defendant desiring to continue the distribution of the motion picture films, which

he had theretofore procured and distributed, because a licensee of the Motion Picture Patents Company, and as such licensee, on satisfactory terms and conditions, continued the conduct of his said business without interference or interruption and without other relation to the said Motion Picture Patents Company than that of licensee.

45. Alleges that on or about April, 1910, this defendant voluntarily and at a price satisfactory to himself, sold his stock of films and supplies to the General Film Company, which thereafter conducted the said business.

46. Alleges that on or about May, 1910, at the request of the President of the General Film Company, this defendant became General Manager of said Company at a salary.

47. Alleges, that as such General Manager, this defendant had no authority to initiate policies on behalf of the General Film Company or to formulate plans, and that this defendant's duties consisted in superintending the selling operations of the General Film Company, under the supervision, direction and control of the President of the General Film Company alone; and that this defendant's position as such General Manager was under the appointment of the Board of Directors and subject to be terminated in their discretion.

48. Alleges that at no time to which the complaint herein refers was this defendant an officer, director or representative of the
101 "licensed manufacturers" in the Motion Picture Patents Company or the General Film Company or otherwise, excepting as herein stated nor was he ever in a position at any time during the period mentioned in the complaint herein, to act independently or except under the direction, supervision and control of the President of the General Film Company.

For a further separate and distinct defense, this defendant

49. Alleges that neither of the alleged acts, commissions or omissions of the defendant set forth in the complaint occurred within six years prior to the date of the commencement of this action, and that none of the alleged cause or causes of action arose or accrued within six years next preceding the date of the commencement of this action.

For a further separate distinct and partial defense, this defendant

50. Alleges that the alleged acts, commissions or omissions of this defendant set forth in the complaint prior to the cancellation of the license agreement on or about February 17, 1911, alleged in the paragraph of the complaint herein numbered "One Hundred Thirteenth," did not occur within six years prior to the date of the commencement of this action and that none of the alleged cause or causes of action, based on such alleged acts, commissions or omissions arose or accrued within six years next preceding the date of the commencement of this action.

102 For a further separate and distinct defense, this defendant

51. Alleges upon information and belief, that the plaintiff is and at the time of his alleged purchase of the claims in controversy, set up in the complaint herein, was an attorney and counsellor-at-law of the State of Ohio, practicing as such before the Courts of that State.

52. Alleges upon information and belief, that at the time of said alleged purchase, it was, and is now, the law of the State of Ohio, that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such demand by such purchase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the State of New York.

53. Alleges upon information and belief, that the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon.

Wherefore, this defendant demands judgment that the complaint herein be dismissed, with costs.

DWIGHT MacDONALD,
Attorney for Defendant, Percival Waters.

Office and Post Office Address, 15 William Street, New York City.

103 STATE OF NEW YORK,
County of New York, ss:

Percival Waters, being duly sworn, says that he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

PERCIVAL L. WATERS.

Sworn to before me this 15th day of March, 1917.

MARY A. McCARTHY,
[SEAL.] *Notary Public No. 21, N. Y. County.*

104 At a Term of the United States District Court, held in and for the Southern District of New York, at the Post Office Building in the City of New York, Borough of Manhattan, on the 22nd day of May, 1917.

Present: Hon. Julius M. Mayer, Judge.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY et al., Defendants.

Order Granting Separate Trial on Issue of Champerty.

This cause having been called for trial on this day, and plaintiff having moved that the issue of champerty set forth in the answers of the defendants as a separate or affirmative defense, be tried before the other defenses raised by the answers; the defendants not opposing such application, and all of the parties having consented that the issues of fact and law arising under the defense that the plaintiff, while he was an attorney-at-law, obtained the assignment of the cause of action sued upon, as set forth in paragraphs LXIV to LXVI of the answers, be tried preliminarily and before the other issues in the case,

105 Now, after hearing Gustavus A. Rogers, Esq., of counsel for the plaintiff, and Samuel Seabury, Esq., Charles F. Kingsley, Esq., and George F. Scull, Esq., of counsel for the defendants: it is

Ordered, that the motion be granted and that the issues of fact and law arising under the defense contained in the answers of the defendants under paragraphs LXIV to LXVI be separately tried at this (the May) Term of the Court on May 28th, 1917, the said cause to be placed at the head of the calendar for that date; and it is further

Ordered, that if the judgment of the Court or the verdict of the jury shall be in favor of the plaintiff, or the issues so separately tried, that the trial of the other issues in the case be then set for either the June or October Term, as to the Court may seem proper.

Enter,

J. M. MAYER,
J. U. S. D. C.

106 *Order Resettling Order Granting Separate Trial of Issue of Champerty.*

At a Term of the United States District Court, held in and for the Southern District of New York, at the Post Office Building, in the City of New York, Borough of Manhattan, on the 31st day of May, 1917.

Present: Hon. Julius M. Mayer, Judge.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY et al., Defendants.

This cause having been called for trial on this day, and plaintiff having moved that the issue of champerty set forth in the answers of the defendants as a separate or affirmative defense, be tried before the other defenses raised by the answers; the defendants not opposing such application, and all of the parties having consented that the issues of fact and law arising under the defense that the plaintiff, while he was an attorney-at-law, obtained the assignment of the cause of action sued upon, as set forth in paragraphs LXIV to LXVI of the answers, be tried preliminarily and before the other issues in the case,

107 Now, after hearing Gustavus A. Rogers, Esq., of counsel for the plaintiff, who objects to so much of this order as is included between the words "including the title" to "sued upon," and Samuel Seabury, Esq., Charles F. Kingsley, Esq., and George F. Scull, Esq., of counsel for the defendants, it is

Ordered, that the motion be granted and that the issues of fact and law arising under the defense contained in the answers of the defendants under paragraphs LXIV to LXVI, including the title of plaintiff to the cause of action herein sued upon, be separately tried at this (the May) Term of the Court; and it is further

Ordered, that if the judgment of the Court or the verdict of the jury shall be in favor of the plaintiff, on the issues so separately tried, that the trial of the other issues in the case be then set for either the June or October Term, as to the Court may seem proper.

JULIUS M. MAYER,
J. U. S. D. C.

108 *Extract from Minutes.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 29th day of day in the year of our Lord one thousand nine hundred and seventeen.

Present: Honorable Julius M. Mayer, District Judge.

L16-175.

JOSEPH H. SAMPLINER,

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival Waters, William Pelzer.

Now comes the plaintiff by Rogers & Rogers, his attorney and Gustavus A. Rogers of Counsel and moves the trial of this
109 cause. Likewise come the defendants Motion Picture Patents Company, Vitagraph Co., Kennedy and Marvin, by Charles F. Kingsley, their attorney; Vitagraph Co., Kleine, Selig Polyscope Co., Spoor, Essanay Film Manufacturing Co. by Samuel Seabury, their attorney; Pathe Freres, and Jacques Berst by Samuel Seabury, Coudert Bros. and Charles B. Samuels, their attorneys; Thomas A. Edison, Inc., Dyer and Pelzer, by Robert W. McCarter and George F. Scull, their attorneys; Kalem Co., by R. O. Moon, its attorney; Waters by Dwight MacDonald, his attorney.

Counsel consent to try the case by eleven jurors. Thereupon a jury of eleven jurors are duly empaneled and sworn. Thereafter on Friday, June 1st, 1917, Mr. Seabury moved to strike out of the complaint the following names: Lubin Mfg. Co., Gaston Melies, George Kleine, Essanay Film Mfg. Co., Selig Polyscope Co., Sigmund Lubin, William N. Selig and George K. Spoor. Motion granted. Exception.

Thereafter on Monday June 4th, 1917, at the close of the testimony on both sides defendant's attorney moves for a direction of a verdict.

Plaintiff's attorney moves for a direction of a verdict.

By direction of the Court, verdict for the defendants. Exception.

Plaintiff's attorney moves to set aside the verdict. Denied. Exception.

Plaintiff's attorney moves for a new trial. Denied. Exception. Execution stayed ninety days after entry of judgment. Stay of ninety days after entry of judgment to sue out writ of error. An extract from the minutes.

ALEXANDER GILCHRIST, Jr.,
Clerk.

110 *Order Granting Motion to Amend Judgment.*

At a Term of the United States District Court for the Southern District of New York, held for the hearing of motions, at the Federal Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 5th day of September, 1917.

Present: Hon. Julius M. Mayer, U. S. D. J.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY et al., Defendants.

The plaintiff having moved by notice of motion dated July 26th, 1917, and returnable before this Court on August 2nd, 1917, for an order directing that the judgment heretofore made herein on July 12th, 1917, be amended and that a judgment in the form annexed to the said motion papers be entered in place and in stead thereof, and the said motion having been duly moved for argument on August 2nd, 1917, and the Court on that day having referred the motion to the Hon. Julius M. Mayer, United States District Judge for hearing, and determination, and the said United States District Judge having directed that the said motion be placed on the Motion Calendar for August 30th, 1917, and the said motion having duly come on for hearing on the 30th day of August, 1917, before the said United States District Judge.

111

Now, after hearing Saul E. Rogers, Esq., of counsel for the plaintiff, in support of the said motion, and William N. Seabury, Esq., of counsel for the defendants in opposition thereto and Charles F. Kingsley, Esq., attorney for defendants Harry K. Marvin, Motion Picture Patents Company, Biograph Company, and Jeremiah J. Kennedy, in opposition thereto, and Dwight MacDonald, Esq., attorney for the defendant Percival Waters, in opposition thereto, it is hereby

Ordered, that the said motion be and the same hereby is granted and that judgment in the form hereunto annexed be entered by the Clerk of this Court, in place and in stead of the judgment heretofore entered on the 12th day of July, 1917.

Enter,

J. M. M.,
U. S. D. J.

112 *Amended Judgment.*

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival Waters, William Pelzer, Defendants.

The issues in this action as framed by the order made herein on the 31st day of May, 1917, signed by the Hon. Julius M. Mayer, United States District Judge, having been duly brought on for trial before the Hon. Julius M. Mayer, one of the Judges of this Court, and a Jury, at a Stated Term of this Court, held on the 29th
113 and 31st days of May, 1917, and the 1st and 4th days of June, 1917; and the issues thus framed by the said order having been tried and a verdict for the defendants on those issues having been directed by the Court; and the Jury, pursuant to said direction having duly rendered its verdict for the defendants on those issues on the 4th day of June, 1917, and the costs of the defendant Motion Picture Patents Company having been adjusted at the sum of Thirty-two and 37/100 ($32.37) Dollars; the costs of the defendant Vitagraph Company of America having been adjusted at the sum of Thirty-one and 12/100 ($31.12) Dollars; the costs of the defendant Pathe Freres having been adjusted at the sum of Thirty-one and 81/100 ($31.81) Dollars; the costs of the defendant Harry N. Marvin having been adjusted at the sum of Eleven and 22/100 ($11.22) Dollars; the costs of the defendant Jeremiah J. Kennedy having been adjusted at the sum of Eleven and 57/100 ($11.57) Dollars; the costs of the defendant Jacques A. Berst having been adjusted at the sum of Eleven and 22/100 ($11.22) Dollars; and the costs of the defendant Albert E. Smith having been adjusted at the sum of Eleven and 12/100 ($11.12) Dollars; and the costs of the defendant Thomas A. Edison, Inc., having been adjusted at the sum of Thirty-one and 12/100($31.12) Dollars; and the costs of the defendant Kalem Company having been adjusted at the sum of Eleven and 12/100 ($11.12) Dollars; and the costs of the defendant Biograph Company having been adjusted at the sum of Eleven and
12/100 ($11.12) Dollars; and the costs of the defendant
114 Frank L. Dyer having been adjusted at the sum of Eleven and 12/100 ($11.12) Dollars; and the costs of the defendant William Pelzer having been adjusted at the sum of Eleven and 12/100 ($11.12) Dollars; and the costs of the defendant Percival

Waters having been adjusted at the sum of Thirty-one and 22/10
($31.22) Dollars.

Now, on motion of Coudert Brothers, attorneys in behalf of th
defendants, it is

Adjudged, that the defendants above-named have judgment again
the plaintiff upon the said issues so framed by the said order mad
herein on the 31st day of May, 1917, and that the defendant Motio
Picture Patents Company recover the sum of Thirty-two and 27/10
($32.27) Dollars, costs as taxed; that the defendant Vitagraph Com
pany of America recover the sum of Thirty-one and 12/100 ($31.12
Dollars costs as taxed; that the defendant Pathe Freres recover th
sum of Thirty-one and 81/100 ($31.81) Dollars costs as taxed; tha
the defendant Jeremiah J. Kennedy recover the sum of Eleven an
57/100 ($11.57) Dollars, costs as taxed; that the defendant Jacqu
A. Berst recover the sum of Eleven and 22/100 ($11.22) Dollars
costs as taxed; that the defendant Albert E. Smith recover the sum
of Eleven and 12/100 ($11.12) Dollars cost as taxed; that the de
fendant Thomas A. Edison, Inc., recover the sum of Thirty-one an
12/100 ($31.12) Dollars costs as taxed; that the defendant Kale
Company recover the sum of Eleven and 12/100 ($11.12) Dollars
costs as taxed; that the defendant Biograph Company recover
115 the sum of Eleven and 12/100 ($11.12) Dollars costs a
taxed; that the defendant Frank L. Dyer, recover the sum o
Eleven and 12/100 ($11.12) Dollars costs as taxed; that the defend
ant William Pelzer recover the sum of Eleven and 12/100 ($11.12
Dollars costs as taxed; that the defendant Percival Waters recover
the sum of Thirty-one and 22/100 ($31.22) Dollars costs as taxed
and that the defendant Harry N. Marvin recover the sum of Eleve
and 22/100 ($11.22) Dollars costs as taxed, making in all the sum
of Two hundred forty-seven 25/100 ($247.25) Dollars, costs a
taxed and that the above named defendants have execution therefor

This judgment is entered pursuant to an order made herein o
the 5th day of September, 1917, amending the judgment heretofor
entered on July 12th, 1917, and is to be entered in place of and in
stead of said judgment of July 12th, 1917.

Judgment signed this 5th day of September, 1917.

ALEX. GILCHRIST, Jr.,
Clerk.

16 United States District Court, Southern District of New York.

Before Hon. Julius M. Mayer, J., and a Jury.

JOSEPH SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William E. Selig, George K. Spoor, Percival Waters, Defendants.

New York, May 29, 1917.

Appearances:

Rogers & Rogers, Attorneys for Plaintiff; Gustavus A. Rogers, Saul E. Rogers, of Counsel.

Charles F. Kingsley, for Defendants Motion Picture Patents Company, Jeremiah J. Kennedy, Harry N. Marvin.

Coudert Brothers, Samuel Seabury and Charles B. Samuels, for Defendants Pathé Frères and Jacques A. Berst.

17 Robert N. McCarter and George F. Scull, for Defendants Thomas A. Edison, Inc., Frank L. Dyer, and William Pelzer.

R. M. Moon, for Defendant Kalem Company.

Dwight MacDonald, for Defendant Percival Waters.

Samuel Owen Edmonds and Samuel Seabury, for Defendants Albert E. Smith, and Vitagraph Company of America.

A jury is impaneled and sworn.

Adjourned.

New York, June 1st, 1917.

The Court: You may open to the jury.

Mr. Seabury: I would like to make a motion first. I move to strike from the complaint the names of the defendants George Kleine, Essanay Film Manufacturing Company, the Selig Polyscope Company, George K. Spoor, and any other defendants, whom there may be, who have not been served.

It appears that this complaint alleges that certain acts of conspiracy were done by these defendants and the defendants that I have named were not served, and, under the Buckeye Powder Company case, the correct practice is to strike their names from the record.

Mr. Rogers: Of course, we can serve them before the trial in the final issue in the case—this isn't the time to strike them out.

The Court: Just indicate those who have not been served.

Mr. Rogers: The Lubin Manufacturing Company, Gaston Melies—I think we can agree that he is dead.

118 Mr. Seabury: He is dead, as I understand.

Mr. Rogers: George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Siegmund Lubin, William N. Selig, George K. Spoor. All of the other defendants have been served, and appear.

The Court: Motion granted. Strike out those names from the case.

Mr. Seabury: There is one other motion, which is a formal motion, and which I make only for the purpose of explanation, as the United States Supreme Court has not passed upon the question.

Mr. Rogers: I take a formal exception.

Mr. Seabury: I would like to move for the dismissal of this cause of action on the ground that the cause of action stated therein is not assignable as a matter of law.

The Court: Well, I will deny the motion.

Mr. Seabury: And your Honor will allow me an exception?

The Court: Yes.

Mr. Seabury: And may we have a stipulation on the record, on behalf of all of the defendants, that as to each motion an exception shall enure to the benefit of all the defendants and all rulings and exceptions may apply in the same way?

The Court: Yes. I will say, in respect of this last matter, as far as I know, there is only one decision on the subject and that is by a Judge of this Court, and I am bound to follow that.

As to the matter of assignment, I take it for granted that we for we are all bound by it.

Opening on Behalf of Plaintiff.

Mr. Rogers: If your Honor please, Mr. Foreman and Gentlemen of the Jury: I propose to tell you briefly what this contro-

119 versy is about, if I may, so that as we present this testimony in support of our position, or the defendant attempts to impose testimony to meet the issues, that you may have in your mind just what the situation is and was during the period that we will talk about.

The plaintiff in this case is suing the defendants under what is called the Federal Anti-Trust law, sometimes referred to as the Sherman Law and now known as the Clayton Law. It is a Federal statute generally which prohibits trusts and monopolies.

It appears that prior to 1910, the Lake Shore Film & Supply Company, which was a corporation organized under the laws of Ohio, had received an agreement which it had reluctantly accepted, and the complaint charges that the Lake Shore Company took the agreement from the Motion Picture Patents Company and other defendants known as the Licensed Manufacturers, because it had no choice; it either had to take that agreement or go out of business, that it operated its business under this enforced agreement which it received sometime in January, 1909, although prior to that time it

arket was open and unrestricted and it had conducted its business
any manner it saw fit.

That in addition to these defendants compelling the Lake Shore
ompany to accept this agreement as it did every other company
milarly situated throughout the United States——

Mr. Seabury: May I interrupt a moment; I object to that, be-
use that is not the issue as described by your Honor.

The Court: Objection sustained. I will only permit you
to say to the jury: That the plaintiff brings an action against
the defendants under the treble damage provision of the so-
alled Sherman Anti-Trust Law, which has now been amended by
he Clayton Act. Then you have to leave that subject.

Then you may say that in connection with certain wrongs alleged
o have been done by the defendants to the plaintiff's assignor, the
laintiff, as an attorney at law, rendered to his client the Lake Shore
ompany, certain professional services which can be described when
e testifies, and thereafter that the Lake Shore Company assigned
s claim to the plaintiff and that he thus became the plaintiff, and
hen you may state what the issue is to the jury.

In this case all the transactions with the Lake Shore Company are
tterly immaterial and irrelevant excepting in so far as it is neces-
ary for Mr. Sampliner to describe the services rendered, and then
e must describe what the services were, should they become an
sue.

Mr. Rogers: I understand from your Honor's ruling, that I am
mited, in making my opening, to these statements and to the sub-
cts your honor has referred to, and none other.

The Court: Yes.

Mr. Rogers: May I have an exception to accord with that?

The Court: Certainly. I have given you a general outline—I
on't mean to say by letter, semicolon and punctuation marks, but
hat is a general outline.

Mr. Rogers (continuing): May I have the record show further,
if I may, that I claim the right to state to the jury what the
issue in the action is, and what the situation was between the
parties, and I claim the right particularly to show to the jury
hat the service that the plaintiff performed before the assignment
as made to him was in connection with transactions had between
he Lake Shore Company, the plaintiff's assignor, and the defend-
nts, and arose out of certain operations and transactions by the de-
endant directed against the plaintiff's assignor?

The Court: You have a right to state the issues, of course, and
he issue is whether the plaintiff has title or whether there is cham-
erty. That is all there is before this jury and before me at this
ime.

Mr. Rogers: I respectfully except to your Honor's limitation.

Under his Honor's direction and ruling, I will state briefly what
he controversy is about.

We shall claim in this case, if it becomes important, (and under
our view of the law, it is unimportant), but should it become im-
ortant in this case and the defendants come forward with testimony

which will require us to show a consideration for the assignment
this plaintiff, we will show that he had been practicing law in Cle
land up to July, 1910, for some twenty-five years; that the La
Shore Film Company was his client; that when these defendants, b
ginning with about the month of July, 1910, to November, 1911,
rected their energies against his client in an attempt to injure h
client and to destroy its business, he was called into consultation b
the Lake Shore Company and was almost continuously, over th
period, in frequent consultation with the president of the co
poration in an endeavor to save his client from what th
122 defendants were trying to do to and with his client.

We shall show you that the time came, in July, 1910, wh
there were some negotiations by a company referred to in the co
plaint as being a company organized and controlled by the defendan
in this suit, to wit, the General Film Company and that, as a res
of the operations of the officers and representatives of the Gener
Film Company, it was believed at that time, by the corporation or
officers, that it was compelled to sell its business to this compa
controlled by the defendant.

That in connection with that transaction this plaintiff was in fr
quent consultation with his client; they made exhaustive examin
tions into the law as to the legal position of the Lake Shore Co
pany, should it refuse to accept the offer of the defendants and s
its business, and what its legal position would be as to compelli
these other defendants known as the Licensed Manufacturers,
continue the service of the product to the Lake Shore Compan
which consisted of these motion picture films, without which th
Lake Shore Company could not go on and transact its business.

So that a serious question of law was presented to this lawyer f
him to determine and advise and remedy, as to whether, if the plain
tiff's assignor refused to accede to the exactions of the defendan
that it could still go on and transact its business and have a legal
equitable way of compelling these Licensed Manufacturers, whom w
contend were combined together at that time, in refusing to supp
the commodity to continue the service.

123 We shall show you further, that as the result of these s
called compulsory negotiations——

Mr. Sealary: If your Honor please, I object to that on the groun
counsel is now doing the precise thing which your Honor sa
should not be done, and he is doing it under the guise of describi
the legal services which his client is alleged to have rendered.

The Court: You mustn't go into the question of compulsory n
gotiations. You have given a good outline of what Mr. Samplin
did.

Mr. Rogers: One of the steps, yes.

The Court: That is a step enough.

Mr. Rogers: Well, I will go to the next step.

We shall show your Honor and gentlemen, that in or about th
month of August, 1910, a representative of the defendants came t
the office of the Lake Shore Company for the purpose of taking po
session of that company without any agreements or without any pa

ments having been made; that a controversy arose between the defendants and this plaintiff's assignor, and the plaintiff was again called into the situation and expended much time and energy and effort in trying to straighten out that situation.

Without going into too many details, I shall simply state that the result of it was that the plaintiff's assignor, the Lake Shore Company, refused to turn over possession without these payments being made and the agreements delivered, and a new situation arose.

There was a company in Cleveland at the time known as the United Film Company, which was a competitor of the Lake Shore Company, and it was brought to the attention of the plaintiff's assignor, the Lake Shore Company, and in turn to the plaintiff, that the United Company's business had been sold to the defendant company through the representation, as we claim, untruthfully made, that the plaintiff's assignor, the Lake Shore Company, had sold its business and surrendered possession of it to the defendants.

The Court: You are getting on forbidden ground again.

Mr. Rogers: I am stating the items of service as they appear in the bill of particulars.

The Court: There is no need of either side making a long opening about the items of service; I can't remember them and the jury won't. That must be developed by the testimony of the witnesses. The office of an opening is simply to tell the jury what the case is about and broadly stating what you expect to prove. I told you what you can do and I trust you will do it. If you don't I will tell the jury what the case is about as disclosed by the pleadings.

Mr. Rogers: Perhaps your Honor can do it more competently than I can, I have no doubt your Honor can—I am willing to take your Honor's suggestion.

The Court: Well, just tell them that this man rendered some service to protect his clients in connection with the allegation that the defendants endeavored to do some wrongs to his clients under the Sherman Anti-Trust Law, and when he gets on the stand he can describe the services, but the first question before the jury now is whether the assignment is a valid, legal assignment, and another question is whether the assignment is what is known as champertous, and you can tell them, if you want to, what champertous is. That is all there is.

Mr. Seabury: If he would say that we wouldn't make any opening at all, your Honor.

The Court: That is all there is to the case. We are not concerned with the wrongs done the Lake Shore Film Company in this litigation; we are only concerned with having Mr. Sampliner describe that the services were that he rendered to his clients, assuming, if you like, for the purposes of the argument, that he thought that they were wronged, although that doesn't make a particle of difference. What is the use of spending a lot of time on it?

Mr. Rogers: I will take your Honor's suggestion. I have certain views, perhaps not in accord with your Honor's views, and may I have an exception, and I will now conclude.

The Court: Yes.

Mr. Rogers (continuing): In any event, gentlemen, Mr. Sampliner carried his client, as we shall show you, through a long series of controversies between his client and these defendants operating against them, as he claimed at that time, and still claims, in violation of the Federal Anti-Trust Law, and the result of it was that his client was practically driven out of business—so much so that the stockholders were compelled to sell their stock.

When they were at about that point in the case, they made an assignment to him, for the past services which he rendered, because they had no cash with which to pay him, of the cause of action that this Lake Shore Company had against these defendants, and so Mr. Sampliner is suing in this case upon the theory that if the Lake Shore Company was suing as the plaintiff, that it would be entitled to
126 recover certain damages, which Mr. Kingsley undertook to tell you the amount of the other day. He said the amount of the damages was $750,000.

I should like, with his Honor's permission, to be permitted to say that the amount stated in our complaint is $250,000, and the law provides that whatever sum a jury—not this jury but some other jury, may award to the plaintiff should be trebled, and that is where Mr. Kingsley gets his $750,000 idea from—because in our complaint we state the damages are $250,000, which should be trebled.

Mr. Kingsley: I told them that the damages would be $750,000; $250,000 trebled is equivalent to $750,000—I made no misstatement.

Mr. Rogers: Well, that is one thing that counsel will agree on, that three times 250 is 750.

In any event, this cause of action was assigned to the plaintiff.

Now, the defendants have set up a defense which we claim is wholly inapplicable to the situation, and in fact we claim is untruthful, for what they state in their answer—they state that at the time of all these controversies the plaintiff was a lawyer——

The Court: You don't deny that, do you?

Mr. Rogers: I admit it, your Honor—I don't know whether it is an accusation or whether it is a compliment—in any event we admit he is a lawyer. And they said that the law of Ohio and in New York was that a lawyer who bought a claim with the intent and knowledge that the same was contested was guilty of what is called champerty and had no title to the claim, and after making some further
127 statement of law, which is a repetition of what I have already said, they put in their answer this very terse statement:

"Upon information and belief, that the plaintiff purchased the demands set forth in the complaint with the full knowledge and notice that the same was contested and would be litigated, and with the intent and for the purpose of bringing an action thereon."

Of course, that we absolutely deny. If they should attempt to offer any evidence in support of that allegation, our proof to meet it will be complete, to the effect that this cause of action was assigned to the plaintiff because, when he was ready to render his bill and be paid for his services in some ten or twelve thousand dollars, which he was willing to reduce to $5,000 if they made a cash payment to

him at the time, they being unable, or in any event not having the funds on hand, assigned this cause of action to him in payment and discharge of their obligations to him.

In addition to that, at the time when this assignment was made to him, we shall show you that he undertook, that if these defendants or any of them were to begin any further law suits or to harass or annoy the corporation by any litigation in any of the courts where he was permitted to practice, that he would defend them against the operations of these defendants and would render his services as their attorney without further payment.

That is about the issue in this case, and if we establish what we claim to be the situation we shall ask that you give us a verdict establishing that the plaintiff did not by this cause of action, with the intent of suing on it or take it in the manner in which the
128 defendants have set forth in their answer, and that is what we are here on, on their answer, in the manner they set forth in their answer, that the plaintiff got this claim, to wit, by purchasing or buying, and that it was a matter of barter and sale.

WILLIAM A. SHERMAN, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. Rogers:

Q. Where do you live, Mr. Sherman?
A. Cleveland, Ohio.
Q. And what is your present ocupation?
A. I am secretary and treasurer of the Burrows Brothers Company.
Q. What business is that corporation engaged in?
A. Books, stationery and publishing.
Q. Were you employed by that company in the year 1911, and particularly with reference to the month of December, 1911?
A. Yes, sir.
Q. And in addition to being employed or connected with that company as its secretary, were you connected in any way with the Lake Shore Film & Supply Company?
A. Yes, sir.
Q. And prior to December 29, 1911, for how long had you been connected or associated with the Lake Shore Company, and in what capacity?
A. As secretary of the Lake Shore Company from the date of its incorporation, and with the former film company they took over and reincorporated into the Lake Shore Film & Supply Company.

129 Mr. Kingsley: A little louder, Mr. Sherman, we can't hear you back here.

Q. Do you mean by that company the company, to the business of which the Lake Shore Company succeeded in about the year 1908?

A. Yes, sir.

Q. So first you were connected with the initial company, and, upon its incorporation in 1908, you became secretary of the Lake Shore Company?

A. Yes, sir.

Q. For how long did you continue to be the secretary of the Lake Shore Company, the Lake Shore Film & Supply Company?

A. Until March, 1912.

Q. I show you this paper, dated Cleveland, Ohio, December 28, 1911, and ask you whether the signature at the foot of that paper is your signature (showing witness paper)?

A. Yes, sir, it is.

Q. During the period from the incorporation of the company until January 1, 1912, who was the President of the Lake Shore Company?

A. Mr. E. Mandelbaum.

Q. Mr. Emanuel Mandelbaum?

A. Emanuel Mandelbaum.

Q. For how long did he continue to be President of that Company if you know?

A. From the date of its incorporation, 1908.

Q. Until when?

A. Until March, 1912.

Q. Had you frequently seen him sign his name in connection with the affairs of the company?

A. Yes, sir.

Q. Are you familiar with Mr. Mandelbaum's signature?

A. Yes, sir.

Q. I show you the signature above the word "President"
130 at the foot of this paper, and ask you whether you recognize the signature?

A. Yes, I do.

Q. Whose signature is it?

A. Mr. Mandelbaum's—Emanuel Mandelbaum.

Q. Do you recall approximately when this paper was signed?

A. The last of December, 1911.

Q. Prior to the paper having been signed——

The Court: Did you say after December?

The Witness: No, sir, the last of December.

Q. Prior to this paper having been signed, was there any action taken with respect to the paper by the directors before you subscribed your name to it?

A. Yes, sir.

Mr. Scull: The minutes, I suppose, will show that, your Honor.

The Court: We will see what the next question is.

Q. What action, if any, was taken?

Mr. Seabury: Objected to.

The Court: Objection sustained. It will be competent to have him state whether he was present at some action, and if so, when?

Mr. Seabury: We have the minute book in court, your Honor.
Mr. Rogers: Produced by the defendants.
The Court: He is entitled to parol testimony in addition, if he wants it.

131 Q. Were you present at a meeting of the Board of Directors of the Lake Shore Film & Supply Company, prior to the 28th of December, 1911, when the subject matter contained in this paper——

Mr. Rogers: Which I ask to have marked for identification.

Q. —was discussed?
A. Yes, I was.

Mr. Seabury: I object to that on the ground that any discussion would be irrelevant. If there was action by the Board of Directors, presumably it was by resolution and would be incorporated in the book.
The Court: I will allow the answer "Yes" merely as preliminary.
Mr. Rogers: Your Honor, my understanding is, according to 214 New York, that it isn't necessary to have any formal resolution or any formal entry in the minutes; that if the action was taken and the agreement delivered and subscribed by the President and Secretary, presumptively it is regular.
The Court: Well, I only rule on questions, you have the answer "Yes" so far.
Mr. Rogers: I offer this paper, Plaintiff's Exhibit 1, for identification, in evidence—before I do that——

Q. Did the Lake Shore Film & Supply Company have a seal that is used in connection with its corporate affairs?
A. Yes, sir.
Q. Are you familiar with that seal?
A. Yes, sir.

132 Q. I show you this impression in the lower left hand corner of the paper and ask you whether you recognize that impression (handing witness paper)?
A. Yes, sir, I do.
Q. Is that the seal?
A. Yes.
Q. Was it on December 28, 1911, the seal of the Lake Shore Film & Supply Company?
A. Yes, sir.

Mr. Rogers: I offer the paper in evidence.
Mr. Seabury: The defendants object to the introduction of this paper in evidence, if your Honor please, on the ground that there is no authority shown, as yet, on the part of those who were assumed to execute this paper to act on behalf of the Lake Shore Film & Supply Company; and further, on the ground that there is no proof yet to show that any alleged services rendered by Sampliner to this Company were a valid consideration for this assignment.

I do not want to digress, if your Honor pleases——

The Court: I will sustain the objection.
Mr. Rogers. I respectfully except.

Q. Prior to the time when you signed this paper, plaintiff's Exhibit 1 for Identification, had there been a meeting of the Board of Directors at which you were present?
A. Yes, sir.
Q. Can you state approximately what the date of that meeting was?
A. Around the first of December, 1911; might have been
133 December 5th, 10th or 15th.

Mr. Seabury: It might have been any time. I move to strike it out, and ask the witness to tell us whether or not there was such a meeting.
The Witness: Yes, there was.
Mr. Rogers: I ask him to give us the approximate date of the meeting, and I submit that he has done it, your Honor.
The Court: I will let it stand.

Q. Were you present at that meeting and did you remain throughout the meeting?
A. Yes, sir.
Q. At that meeting was there any action taken with respect to an assignment to be thereafter made to Joseph H Sampliner?

Mr. Seabury: I object to that.
The Court: I will sustain the objection. Exception. You were secretary of the company? Exception.
The Witness: Yes, sir.
The Court: You kept the minutes, did you?
The Witness: Yes, sir.
The Court: Was it your duty to enter in the minutes everything that took place, outside, I mean, of mere discussions?
The Witness: Yes, sir.
The Court: Was it your duty as secretary to enter in the minutes any action taken by the Board of Directors?
The Witness: Yes, sir.
The Court: Now, you know the minutes when you see them?
The Witness: Yes, sir. I usually kept my minutes—we
134 had a minute book—I didn't write the minutes in the minute book at the time we would have our meeting, but I would note them on a tab of paper. Now, we might have one or two or three meetings before I would recopy them into our minute book; sometimes there would be a month go by before I copied them in, but I always kept a record of all the principal meetings we had, that the stockholders and the directors had; then when I had time I would write them in the minute book.
The Court: Now, you have described your duties and the method of performance?
The Witness: Yes, sir.
The Court: All right, now go on. The question that you asked calls for a conclusion and was leading. Ordinarily I do not care if a question is leading—but when leading questions call for controversy I do not allow them.

Q. At the meeting at which you were present in December, 1911, was there action taken with respect to the paper or the subject matter of the paper marked Plaintiff's Exhibit "1" for identification?

A. Yes, sir.

Mr. Seabury: I move to strike out the answer first, your Honor, and I would like to note an objection. He answered so quickly that it was impossible to object.

I object to the question on the ground that the resolution of the board would be the best proof of that resolution, if any such
135 resolution was indeed passed, and that at present there is no proof before the court that this was any authorized meeting of the corporation at all, or that anybody had notice of it, and if your Honor has any doubt upon the question, then we would ask leave to question the witness preliminarily to the admission of this paper in evidence. Either there was a resolution or there was not. He says he took minutes, where are they? Here is our book.

The Court: Was a resolution offered by anybody?

The Witness: To assign the claim to Mr. Sampliner?

The Court: Yes.

The Witness: Yes, sir.

The Court: I will overrule the objection and you may have an exception.

Mr. Seabury: Note an exception.

The Court: Who offered the resolution?

The Witness: Who offered the resolution to assign the claim?

The Court: Yes.

Witness: I think I was the one who offered the resolution to assign the claim to Joseph H. Sampliner.

The Court: Then what took place—and the defendants may have an objection and an exception.

The Witness: We assigned the claim.

The Court: That won't do, strike it out. What took place?

136 The Witness: We had a director's meeting and the directors all voted to assign the claim to J. H. Sampliner for his claim against us.

The Witness: No, sir, not at this time.

The Court: Do you remember the form of the resolution?

The Court: Who were present?

The Witness: Mr. E. Mandelbaum, Mr. Samuel Green, Mr. Joe Diener, Max Schachtel. That is all I remember—and myself.

The Court: Was it a regular monthly meeting?

The Witness: Well, I think this was a special meeting.

The Court: Very well, then you will have to show authority for calling that special meeting.

Mr. Rogers: I respectively except.

Q. Will you please state what was done before this so-called meeting was called, with regard to calling the meeting?

A. I sent out notices to the directors—if I am not mistaken I sent the notice out to the directors about a week before.

Mr. Seabury: I think that is a little indefinite—if he is not mistaken he sent out a notice to the directors about a week before.

Mr. Rogers: He said he sent the notice to the directors, and in fixing the time he said "if I am not mistaken."

The Court: Read it.

(The same was read by the stenographer.)

The Court: Motion to strike out denied.

137 Q. And was that the notice that was customarily sent to the directors, of a special meeting?

A. Yes, sir.

Mr. Seabury: I object.

The Court: Sustained.

Mr. Rogers: I except. I submit, your Honor, that nobody except a director of the corporation can question whether or not he got sufficient notice. It is for them to question the sufficiency of the notice.

Mr. Seabury: You must show what the by-laws are and what the regular procedure is, etc.

Mr. Rogers: Supposing the directors met informally, your Honor, and passed a resolution without any notice whatever, wouldn't that be binding on third parties?

The Court: I am not here to answer academic questions. I am here to rule.

Mr. Seabury: We have the by-laws here.

The Court: Show what the by-laws are and show what the thing was. They are attacking your title.

Mr. Rogers: Well, they have the minute book in their possession, and I have had no opportunity to get access to it——

Mr. Seabury: Your Honor, he has had an opportunity to get access.

Mr. Rogers: Let me finish my statement. I have had no opportunity to get access to it except under your Honor's direction the other morning, for about two hours. I have had no opportunity of making any copies from it, and the best I could do was to glance hurriedly through it and return it by one o'clock.

138 The Court: Let me ask, whatever the action was, did you make a copy of it in the minute book of the board of directors.

The Witness: I think so. As I told you, as I said, I made my notes.

The Court: No, there was a regular minute book of the board of directors?

The Witness: Yes, sir, a regular minute book of the board of directors.

The Court: Is this the book that counsel has?

Mr. Rogers: We needn't waste any time on that proposition. As far as the minute book is concerned, there is no record between December 4, 1911 and 1913.

The Court: You mean no record at all?

Mr. Rogers: There is no record in the minutes from December, 1911, to sometime in 1913, when there was a new ownership in the stock of the company. They have known that all the time there is no mystery about that. You see, after the typewritten

matter, there was a new ownership in the stock of the company that passed into the Mutual Company.

The Court: Well, now, is the book that has just been handed you, the minute book of the board of directors?

The Witness: Yes, sir.

The Court: And do you see your signature on various pages?

The Witness: Yes, sir.

The Court: Is the record of this matter to which you testified anywhere in this book?

139 The Witness: Supposed to be, yes, sir.

Mr. Seabury: I will have to ask to strike that out, what was supposed to be, and his own counsel admits it isn't there.

The Court: Motion granted—when I say it is granted, you mean it is not there now physically?

Mr. Seabury: Well, was it ever there?

Mr. Rogers: May I ask your Honor to permit me to inquire, or have your Honor inquire when he last saw this minute book, and in whose possession it was in and how it is now found in the possession of the defendant?

The Court: Ask him.

Q. When did you see the minute book last?

A. I think March 12, 1912.

Q. At that time was there a change in the Lake Shore Company?

A. Yes, sir.

Q. What occurred on or about the 12th of March, 1912?

A. The Lake Shore changed hands and Mr. Frauler was called up on the phone to come right up to the Lake Shore Company, and in about ten minutes they transacted their business and he took the minute book and left.

Q. Who took the minute book?

Mr. Seabury: I object to that, your Honor. It doesn't appear who did this, simply that something was done.

The Witness: Mr. Frauler took the minute book.

Mr. Seabury: Who is Mr. Frauler?

The Witness: I think Alfred Frauler of the Mutual.

140 Mr. Rogers: The book shows, President of the Mutual Film Corporation.

The Witness: Took the book and my papers and he left.

The Court: I will allow that.

Mr. Seabury: Your Honor allows that?

The Court: Solely to show that he has not seen the book since that date.

Mr. Seabury: The suggestion I think was very vague, in about ten minutes they took the book and left, when they bought this whole concern.

The Witness: He was there about ten minutes.

Q. From March, 1912, when you delivered the minute book to Mr. Frauler, whom you described as the President of the Mutual

Film Corporation, until this book was shown to you in court a few minutes ago, have you seen that book?

A. No, sir.

Q. Is that book, and I call your attention particularly now——

Mr. Rogers: May I have the record show that this minute book is produced out of the possession of the defendants and by defendants' counsel?

The Court: Yes.

Q. And I call your attention particularly to page 16, which is blank, and the next page numerically numbered as 19, and I ask you whether that book is in the same condition now as it was at the time you delivered it to somebody in March, 1912?

A. No, there were no pages torn out that I ever remember, no sir.

141 Mr. Rogers: So that we may have it clearly before us may I ask that it appear on the record that the pages between 16——

Mr. Seabury: Don't show it to the jury until it is in evidence.

Mr. Rogers: I was going to show them the top of the page.

The Court: You have no right to.

Mr. Rogers: May the record show that the pages referred to as pages 17 and 18, which are evidently missing from the book.

The Court: No, the record may show that the last numbered page is whatever it is, numbered so and so, whatever it is.

Mr. Seabury: I have no objection to his offering it in evidence if he wants to, then the jury can see it.

The Court: Will it take long, the examination of Mr. Sherman? Is he going to stay here until Monday?

Mr. Rogers: That depends on whether I am put to technical proof or not.

The Court: Well he says he expects to stay here until Monday, so do you want to offer that?

Mr. Rogers: I just want to refer to these pages.

The Court: Let the record show that the last numbered page, pages 16 and 19, are marked for identification.

Mr. Rogers: Can I have the record show also your Honor, the condition of this book, that these pages seem to have been removed?

142 The Court: The record can't show the condition of the book, but the book itself, for that purpose, may go to the jury.

Mr. Rogers: Couldn't I describe it for the purposes of the record?

Mr. Seabury: When we get it in evidence, then I have no objection to your Honor describing it.

Mr. Rogers: Your Honor wishes to make some direction?

The Court: I simply said that the clerk will mark those two pages that you are offering.

Marked Plaintiff's Exhibits 2 and 3.

Q. At the time when you delivered this book to Mr. Frauler——

The Court: If you are going to stay here until Monday——
Mr. Rogers: May I put this question before this witness leaves, just one question?
Q. At the time when you delivered the book to Mr. Frauler, was there anything in this book?
A. Yes, sir.
Q. Between the pages——

Mr. Seabury: May "Yes, sir" be stricken out?
The Court: Yes.

Q. Between page 38 and the typewritten and printed matter that follows on page 39?
A. Yes, sir, I had some blanks—some paper in there with my minutes on, my uncopied minutes.
143 Q. When you say uncopied minutes, do you mean that they hadn't been physically entered in the book.
A. Minutes I hadn't had time to copy from my paper, from my tablet paper into the minute book.
Q. And in what form were those additional minutes?
A. They were in tablet form; I kept my minutes in tablet paper form and then rewrote it in ink in my minute book.
Q. What period of time did those additional minutes cover, from when to when, approximately?
A. Up to the time that I resigned as secretary of the Lake Shore Film & Supply Company.

The Court: When was that?
The Witness: March, 1912.

Q. Did you write out a formal resignation as secretary of the company?
A. Yes, sir.

The Court: We will suspend now until a quarter past ten Monday morning—10:15.
Adjourned to Monday, June 4, 1917, at 10:15.

New York, June 4, 1917.

WILLIAM A. SHERMAN, resumed the stand:

Direct examination continued:

By Mr. G. A. Rogers:

Q. Mr. Sherman, when this paper, Plaintiff's Exhibit 1 for identification, was signed by Mr. Mandelbaum and yourself in the matter to which you testified, what was then done with this paper?
A. Turned over to Mr. Sampliner.
144 Q. You mean Joseph H. Sampliner?
A. J. H. Sampliner.
Q. The plaintiff?
A. Yes, sir.

Q. Was that delivery made in your presence?
A. Yes, sir.

Mr. Rogers: I offer the paper in evidence.

Mr. Seabury: The defendants object to the introduction of the paper in evidence on the ground that there is no authority shown for the making of it. On Friday the witness testified, in response to your Honor's inquiry, that it was made at a special meeting. There is no evidence yet that any special meeting was called at all, and I object to it further, on the still more fundamental ground that goes to the very gist of this whole case.

It is not enough, as I understand it, for the plaintiff to show that he has an assignment of a cause of action. When a lawyer shows that he has an assignment of a cause of action then he shows that he is within the condemnation of the champerty law. In order to bring himself without that law, he must show that that was an assignment made to him for services actually rendered.

I don't know whether your Honor thinks that the New York law is applicable here or the Ohio law—personally I think it makes very little difference, as I think the law is the same in both jurisdictions—but I hold that Sections 73 and 74 of the Code of Civil Procedure—now Section 274 and 275 of the penal law, re-
145 presses the common law rule, and that rule was very plain that if an attorney took an assignment of a cause of action he was guilty of champerty, unless he went further and showed that it was for services actually rendered.

The Court: I will hear the other side.

Mr. Rogers: If your Honor please, the New York statute that is applicable expressly provides that an attorney may lawfully take an assignment of a cause of action in payment of past services. I don't think there can be any question about that; that is the rule in this State and has been for a great many years, long before I was born and long before perhaps nearly every lawyer in this case was born.

Judge Seabury is in error when he says that the mere production of an assignment by an attorney is of itself evidence of champerty. On the contrary, that very question was decided by our Appellate Division, Chief Justice Bartlett, subsequently Chief Justice of the Court of Appeals, who wrote an opinion in that case, and this is what he said. I will read it, it is very brief:

He said: "The transfer to the the attorney is attacked in behalf of the appellants on the ground that it was forbidden by Section 73 of the Code of Civil Procedure prohibiting an attorney or a counsellor from buying any promissory note or other chose in action, with
the intent and the purpose of bringing a suit thereon.
146 *There* mere assignment, however, of a certain thing in action to a person who happens to be an attorney, does not of itself suffice to establish the fact that it was made with the intent and purpose of bringing suit." That is the unequivocal language of Judge Bartlett in the case of Creteau v. Fort Thorn Glass Co., 40 App. Div., 215.

Now, may I go a step further, your Honor: In every case in this state that I have been able to find, it has been held that the defense of champerty is an affirmative defense and that the burden is on the party who alleges champerty to establish it; if it is an affirmative defense I am not obliged to anticipate it.

Now on the question of the assignment, in Ohio, in New York, in the United States courts, the rule is unequivocal that where a paper is produced purporting to be signed by the President of a corporation and the Secretary, and has the seal of the corporation attached that prima facie is presumptive proof that there was authority in the officers to execute the instrument.

And the cases go still further and say that even if there was a defect or a lack of authorization, that the only person who could raise that question would be the stockholders or the creditors of the corporation, or the corporation itself, and then only by direct action.

The Court: My view of the law is this: This is the first case, as I understand, which has come up, in which there is an assignment of the cause of action arising under the so-called Sherman Anti-Trust Law, to an Attorney. There is only one other case that has been called to my attention where there has been any assignment of a cause of action—or rather, it was not really an assignment, it was a right, if one may call it such, that the corporation had as a matter of law by virtue of the dissolution of a corporation. That case you are all familiar with in which Judge Hough held that the receiver of the corporation was entitled to the same rights in this regard as the corporation itself. Quite irrespective of the question of assignment, the court naturally would be inclined to preserve for the creditors of a corporation, what might turn out to be a valuable asset. Now, where an attorney takes an assignment of a cause of action under this statute, so far as this court is concerned, he must show affirmatively what it is of value that he has given for that cause of action. The rule is that the Federal courts must follow the relevant local law, so far as possible, or words to that effect; it places the duty on the Federal courts as near as may be of following the local law whether in this instance it be the Ohio law, the place where the transaction took place, or the New York law where the trial forum is laid. But that provision does not command the Federal courts to release their own judgment as to what the law is that they will apply in respect of the Federal statute in a Federal jurisdiction. The law of this case, for the time being, is that the plaintiff must show what it was of value he gave to this company, this plaintiff's assignor, and until he does, I shall not receive the paper in evidence.

The objection is sustained, and you may have an exception.

Mr. Rogers: I take an exception. Your Honor, in order that there may not be any misapprehension—I am quite sure that there won't be any—I suggest that it be made clear that the corporation that your Honor referred to was not this corporation, but was the Imperial Film Corporation, and that your Honor's remarks had no relation to the Lake Shore Company.

The Court: None whatever. I was only illustrating the point by reference to the Imperial Film Exchange, or whatever it was called.

Mr. Rogers: May I suggest, in order to save time, that the paper be received subject to my connecting it?

The Court: No. Let me ask you a question or two, Mr. Sherman—preserving Mr. Rogers' exception.

By the Court:

Q. I asked you this the other day, and I don't know whether your answer was quite clear, perhaps it was: Did you hear anybody offer a resolution at that meeting?

A. I offered the resolution.

Q. What was the resolution, in substance; you are not
149 expected to remember the words?

A. That we assigned——

Mr. Seabury: Your Honor won't object to my noting an objection? The Court: Certainly not.

Mr. Seabury: Exception.

A. We assigned our claim against the Motion Picture trust to J. H. Sampliner to cancel our debt.

Mr. Seabury: I ask that the Motion Picture trust be stricken out.

Mr. Rogers: May I have his answer read?

The Court: No. I will deny this motion and you may have an exception.

Mr. Rogers: But may I have the answer read?

(Answer read by the stenographer.)

Mr. Kingsley: I object to the answer as embodying a conclusion and move to strike out the statement, "Motion Picture trust."

Motion denied. Exception.

By the Court:

Q. Now, was Mr. Sampliner present?

A. At that meeting?

Q. Yes.

A. No, sir.

Q. Had you received a bill up to that time from her?

A. No, sir.

Q. Had you received any communication from him about his services, from the standpoint of demand payment?

A. Why, he had stated——

Q. No, no, a communication; I mean writing.

150 Mr. Rogers: Pardon, may I preserve the same objection and exception to this entire line, on the ground that it is incompetent, irrelevant and immaterial.

The Court: Yes.

A. No, sir, not that I remember.

Q. You had not?

A. No, sir.

Q. You had received no letter or paper writing of any kind from him?

A. Not in connection with this matter, no, sir.

Q. Not in connection with this matter?

A. Well, the matter of our cancellation of our license.

Q. I am talking about this.

Q. I am talking of a paper which has been marked Plaintiff's Exhibit I for identification; you see that paper?

A. Yes, sir. We had been informed——

Q. Wait a moment, follow my questions. Prior to the execution of that paper, had you received any communication from Mr. Sampliner—don't give me the details, just say yes or no—in respect of any claim for legal services?

A. Yes, sir.

Q. Where is it, and when I say communication I mean a written communication?

A. No, sir.

Q. You have none?

A. No, sir.

By Mr. Rogers:

Q. I believe you said Mr. Sherman, on Friday, that at the meeting at which the resolution was adopted, there were four directors and yourself present, making five in all?

A. Yes, sir.

Q. How many directors were there of the corporation at that time?

A. Five.

151 Q. And were the five whose names you have mentioned the five directors of the corporation?

A. Yes, sir.

Q. Who owned the stock of the corporation at that time?

A. Mr. Mandelbaum.

Q. Let me put it differently. Were these five men the sole stockholders of the corporation?

A. Yes, sir.

Q. Were the five who were present at that meeting the owners of a hundred percent of the stock of the corporation?

A. Yes, sir.

Q. There was a question asked as to the notice, if any, you sent of that meeting; can you tell now, as far as your recollection will permit, substantially what the form of that notice was?

Mr. Seabury: I object to that, it doesn't yet appear that he gave any notice. He said in response to your Honor's inquiry, as I recall it, that there was a special meeting.

The Court: Did you send out any notice?

The witness: Yes, sir, I sent a special notice out stating that there would be a meeting.

The Court: In writing?

The Witness: Yes, sir.

The Court: Did you mail it?

The Witness: Mailed it, yes, sir.

The Court: You may answer.

The Witness: I mailed a special notice out to each one of the directors, stating the object of our meeting.

The Court: What did you state?

The Witness: That we were to meet for the purpose of
152 talking over the assignment of our claim against the Motion Picture Trust to J. H. Sampliner, to cancel his account against us.

Mr. Rogers: In order to preserve the record, I hope your Honor won't think I am over-persistent, if I make an offer and take a formal exception.

The Court: Don't be embarrassed at all, you take every exception you think you are entitled to.

Mr. Rogers: Thank you. I offer in evidence this paper, Plaintiff's Exhibit 1 for Identification.

Mr. Seabury: Same objection.

The Court: Objection sustained on the ground heretofore stated.

Mr. Rogers: I except.

Q. Prior to the meeting at which the resolution was adopted that you have described, had Mr. Sampliner performed the services for the Lake Shore Company?

A. Yes, sir.

Q. And over what period of time had that extended?

A. Started in July of 1910, and ended on this account in December.

The Court: Of what year?

The Witness: 1911—but he was to continue or providing we had any trouble with the Motion Picture trust, after the assignment, without any extra charge.

The Court: What was the date of this meeting at which this Mr. Frauler was present, in which you *you* said the minute book was taken, or something of the sort?

The Witness: That was in March, 1912.

153 By Mr. Rogers:

Q. Now that we are upon that subject, Mr. Sherman, about March, 1912, was there a change in the ownership in the stock of the Lake Shore Company?

A. Yes, sir.

Q. What did the stockholders whom you have named as Emanuel Mandelbaum, Max Schachtel, Samuel Greene, Joseph Diener and yourself do with the stock?

A. Why it was sold to the Mutual Film Corporation.

Q. And at that time what was done with the book and papers, including the minute book which the defendants have produced in court?

A. Mr. Frauler took the minute book.

Q. Were you present at the time when the minute book was taken by him?

A. Yes, sir.
Q. Did you personally deliver it to him?
A. No, sir, but I was present at the time.

The Court: Well, the handing over of the minute book and other documents was part of the transaction.
The Witness: Yes, sir.
The Court: I mean there wasn't any stealing of minute books.
The Witness: No, sir.

By Mr. Rogers:

Q. You testified on Friday that at that time you wrote out a written resignation; you wrote out your resignation?
A. Yes, sir.
Q. What did the other officers of the Lake Shore Company do at that time?
A. We all wrote out our resignation.
Q. As far as you recall, will you give us the names of the persons who were the officers of the Lake Shore Company?
A. E. Mandelbaum.
154 Q. What office?
A. President and Treasurer; W. A. Sherman, Secretary.
Q. Shortly before the shares of stock were sold to the Mutual Film Corporation, had Mr. Mandelbaum resigned as the Treasurer of the Lake Shore Company?
A. Yes, sir.

The Court: Resigned as Treasurer?
Mr. Rogers: Yes.

Q. Who was elected Treasurer in his place?
A. Mr. Samuel Green.
Q. At the time when this transaction was had with the Mutual Film Corporation were the resignations of all these officers filled out and delivered at the same time?
A. Yes, sir.
Q. When you examined this minute book on Friday, did you see or do you see now these resignations anywhere in the book?
A. No, sir.
Q. So that in addition to the minutes, these loose minutes that you testified you had written in tablet form, which you say are not now in court, there are also missing these resignations?
A. Yes, sir.
Q. Will you look in the back of that book, please, Mr. Sherman; is there a record there of the stock ownership of the Lake Shore Company?
A. Yes, sir.
Q. Can you by looking at that record and refreshing your recollection therefrom, testify from memory who owned the stock in the Lake Shore Company on December 28, 1911, and the number of shares of stock that each of the persons owned?

The Court: He needn't waste any time on that; look at the book and read it off.

155 Q. Were there 100 shares of stock incorporated?
A. 100 shares of stock.
Q. $100 each?
A. Yes.
Q. Was the capital $10,000?
A. Yes, sir.
Q. How were the shares of stock divided and how had they been divided at all times, so far as you know?
A. Mr. Mandelbaum had two-thirds; Jacob Diener, one-third, and one share each to the other directors.
Q. You see, you have given us more than 100 per cent.

The Court: Just find the thing and read it off into the record.
The Witness: Mr. Mandelbaum had 63 shares; Jacob Diener 34 shares; W. A. Sherman, 1 share; Max Schachtel, 1 share; Joe Diener, 1 share.

Q. About December 4, 1911, was there a change in the ownership of the 34 shares of the Jacob Diener stock?
A. Yes, sir.
Q. About when was that transfer or change made?
A. Around the first of December Mr. Diener sold out his interest.
Q. And how many shares did he sell and to whom were they sold?
A. Sold them to Mr. Samuel Green.
Q. All of the shares? Will you look at the minutes of December 4, 1911, that may help you?

Mr. Seabury: To save your Honor's time we will concede the manner in which shares were held and consent that it may be read from the book to the jury.

156 Q. What I want to know is this: Did Mr. Green acquire all of Mr. Jacob Diener's shares of stock?
A. No, sir; I think Mr. Mandelbaum acquired some.
Q. I beg your pardon?
A. Mr. Mandelbaum, I believe.
Q. Would you look at the book, please, and tell us.

The Court: Do you know where it is, Mr. Rogers?
Mr. Rogers: My understanding was that Diener sold all his shares of stock to Green.

Q. What was that transaction regarding the Jacob Diener shares of stock?
A. Mr. Diener sold his 34 shares to Mr. E. Mandelbaum; Mr. E. Mandelbaum sold a certain amount of the stock to Mr. Green.
Q. In any event Jacob Diener ceased to be a stockholder on or about December 4, 1911?
A. Yes, sir.

The Court: In other words, that left four directors?
Mr. Rogers: That left five.

Q. Then was Mr. Green elected director in place of Diener?
A. Mr. Green was elected director and treasurer of the company at that time.
Q. Was he elected director in place of Jacob Diener, who ceased to be a stockholder?
A. Yes, sir.
Q. So at the meeting at which this resolution was adopted, in order to summarize, every director and every stockholder of the corporation was present?
A. Yes, sir.

157 Q. Prior to the meeting at which this resolution had been adopted, had there been a conference with Mr. Sampliner regarding the services when he had up to the time rendered to the Lake Shore Company?
A. Yes, sir.
Q. Had there been a meeting of the directors at which action was taken with respect to the arrangement of a conference with Mr. Sampliner by one or more of the officers of the Lake Shore Company?
A. Yes, sir.

Mr. Seabury: I object to that on the ground that the testimony is given by counsel and not by the witness. He stated there was a conference and I think we are entitled to know with whom and what took place.
The Court: I will allow the question as preliminary. Now who was at the meeting and what happened.
The Witness: We had a regular directors meeting and at that meeting we took up the matter of our condition, due to the Motion Picture trust, and authorized Mr. Max Schachtel and Mr. Mandelbaum to see Mr. J. H. Sampliner in regard to what claim we might have against the Motion Picture trust.

Q. Were they directed to make a report at a following meeting?

The Court: No, that is leading.
Mr. Rogers: I withdraw it.

Q. What if anything occurred subsequent to the time when this transaction took place?
A. We had a meeting of the directors.

158 By the Court:
Q. You had a meeting, you say?
A. Yes, sir.
Q. At which Schachtel and Mandelbaum were authorized to see Sampliner?
A. Yes, sir.
Q. Was it there stated what they were to see him about?
A. Yes, sir.
Q. What was it?

A. To see about what action or claim we might have against the Motion Picture trust for the cancellation of our license and the ruining of our business.

Q. What date was that?

A. I couldn't say, it was around about the 8th or 9th.

Q. Of December?

A. Of December, yes, sir.

Q. The 8th or 9th of December, 1911?

A. Around that date, yes, sir, I couldn't remember.

Q. Was there anything further said to Schachtel and Mandelbaum?

A. No, they were appointed to go and see Mr. Sampliner, which they did.

Q. What happened after that?

A. Right after that was when we called our special meeting. Mr. Mandelbaum had taken the matter up with Mr. Sampliner and he made his report at that special meeting.

Q. All right, what did he say?

A. He stated that Mr. Sampliner had stated that it would cost us from eight to ten thousand dollars to bring a suit, and at that time Mr. Mandelbaum asked Mr. Sampliner how much the Lake Shore Company owed; if I am now mistaken, he said nine to ten thousand or ten to twelve thousand dollars, just now I don't know, and that our finances were such that we couldn't pay either Mr. Sampliner or start a suit and Mr. Mandelbaum at that time asked Mr. Sampliner if he would n't take——

150 Mr. Seabury: I feel bound, your Honor, to enter an objection to this conversation between Mandelbaum and Sampliner.

The Court: Is that what he reported to the meeting?

The Witness: Yes, sir.

The Court: I will take it on that theory, go ahead.

The Witness: Mr. Mandelbaum stated he couldn't pay such an amount and asked him if he wouldn't take our claim against the Motion Picture trust in settlement of his account. Mr. Sampliner reported to Mr. Mandelbaum a day or two after Mr. Mandelbaum had first seen him about it, and Mr. Schachtel, that he would, and we called a special meeting for that purpose.

Q. In other words, as I understand it, report was made that Mr. Sampliner would take an assignment of your claim against various defendants that you call the Motion Picture trust, in full for services rendered?

A. Yes, sir.

Q. And Sampliner wasn't to charge you anything more?

A. No, sir, providing there weren't any other law suits or any suits come on from any patent that the trust might have.

Q. You mean by that as was to render——

A. He was to render us any services in connection with any trouble we might have with the Motion Picture trust.

Q. In the future?

A. In the future.

Q. So far as the past was concerned this was in full payment for the services?

A. Yes, sir.

Q. And at that time you hadn't the funds to prosecute the action?

A. No, sir.

160 Q. Had you been advised that there was a cause of action?

A. Not at that time when we took the matter up; up to that time, no, sir.

Q. I mean when you executed this paper to Sampliner, had Sampliner told you you had a case against the so-called Motion Picture trust?

A. Not to me personally.

Q. Well, I mean——

A. But from the fact——

Q. Was any such thing stated at the meeting?

A. No, sir; we all presumed that we had.

The Court: Strike that out.

Q. Was it stated in your presence by Mr. Sampliner or by anybody at that directors' meeting that the Lake Shore Film Company had a cause af action?

A. No, sir.

Q. Against these various defendants you have designated as the Motion Picture trust?

A. No, sir.

Q. At that time you didn't know that from any advice of your attorney, whether you had a case or not?

Mr. Rogers: May I ask whether he knows personally.

Mr. Seabury: Please, I think he shouldn't interrupt in putting that questioin.

The Court: You may reserve anything you have in mind.

Mr. Rogers: May I have an exception, your Honor, to the form of the question as to its competency, relevancy and materiality?

The Court: Yes.

Mr. Rogers: And I except.

161 Q. At that time you didn't know?

A. No, sir.

Q. So far as you were informed, had the board of directors been informed as to whether or not the Lake Shore Company had a cause of action against any of these persons or corporations which you have called the Motion Picture trust?

A. Well, as far as myself is concerned I thought we had.

Q. I don't want your thought, I want what was said?

A. I don't remember whether anything was said now or not.

Q. You have no recollection?

A. No recollection now.

Q. Did you ever have a written communication from Mr. Sampliner on the subject, and by you I mean either you or the Board of Directors or any of them that you know of?

A. I think we did.

Mr. Seabury: I move to strike that out.
The Court: Yes, strike it out.

Q. Can you say whether you did or not?
A. No, sir, I can't.
Q. Up to that time had Mr. Sampliner, so far as you know, indicated to the board of directors of this Lake Shore Film Company what his services were worth?
A. At the time that——
Q. Prior to this occasion?
A. Prior to this assignment he had stated to the committee, or Mr. Mandelbaum and Mr. Schachtel who were authorized to see him in regard to our claim what the account was.
Q. You don't understand, you have told us that; you have told us that a committee was appointed to see Mr. Sampliner, and
162 that committee was Mr. Schachtel and Mr. Mandelbaum, and you have testified that Mr. Sampliner and Mr. Schachtel were to come back and make a report; and you have told us about that?
A. Yes, sir.
Q. Eliminate that from your mind. My question is whether prior to that time you had received any bill from Mr. Sampliner, and by you I am always referring to the corporation?
A. No, sir.
Q. Prior to that time had the corporation been informed by Mr. Sampliner, so far as you know, of any claim for services?
A. Not in connection with this matter.
Q. That is what I mean?
A. Not in connection with this matter, no, sir.
Q. Was he your attorney in some other matters?
A. Yes, sir.
Q. And in regard to those matters did he render bills?
A. Yes, sir.
Q. And those bills were paid?
A. Yes, sir.
Q. But they were unrelated to this matter?
A. Yes, sir, petty bills.
Q. So, as I understand it, so far as this matter was concerned, up to the time that Schachtel and Mandelbaum reported you had received no bill or demand, orally or in writing for any legal services in this connection from Mr. Sampliner?
A. No, sir.
Q. That is correct—is it?
A. Yes, sir.
Q. Now, at this meeting at which Plaintiff's Efflhibit 1 for Identification was discussed, had you been advised by Mr. Sampliner, or did the committee report that he had advised as to what damages, if any, you would be entitled to?
A. Yes, sir.
163 Q. So, at that time I assume you didn't know whether your damage would be a dollar or a million?

A. Yes, sir.
Q. Is that correct?
A. Yes, sir.

Mr. Rogers: When you say you didn't know, you are referring to yourself.
The Witness: Yes, sir, I am referring to myself in that.

Q. I am referring now not merely to your own personal knowledge but as to whether or no anything was said at this directors' meeting on the subject?
A. As to damages, no, sir, nothing was said.
Q. Nothing was said?
A. No, sir, as to the amount of damages we might get or might not.
Q. Nothing said at all, is that right?
A. Yes, sir.
Q. Were you advised that you had any case against the Motion Picture trust, so-called?

Mr. Rogers: Your Honor, in order that the record may be preserved, I understand that all these questions are considered formally objected to on all the grounds, and I have a formal exception. My theory is that——
The Court: Certainly. I am quite indifferent as to whether you have a formal exception or a real exception.
Mr. Rogers: I mean exception.
Mr. Seabury: I don't object to his exception, but I object to his stating what his real theory is.
Mr. Rogers: I didn't say real theory, I said because my memory is——
Mr. Seabury: I object to the theory, we want the facts.
164 The Court: You may have an objection to each and every question asked by me.
Mr. Rogers: Without stating the grounds?
The Court: Yes, until I notify you to call special matters to my attention, and you may have an exception to my ruling.

Q. At the time of this meeting, I repeat, was anything said by anybody as to whether or not you did have a case, putting the matter in popular language, against the so-called Motion Picture trust?
A. We discussed that matter a number of times.
Q. No, no, the point is, at that meeting, did any one say that you were advised by Mr. Sampliner that you had a case against the Motion Picture trust?

The Witness: I think that was discussed, that we had a case against the Motion Picture Trust, but we had no funds to prosecute.

Q. You haven't answered my question. Did Mr. Mandelbaum and Mr. Schachtel inform that board of directors on that occasion whether Mr. Sampliner had advised that the Lake Shore Company had a cause of action against the so-called Motion Picture trust?
A. Yes, I think a statement was made that we had a good case against the Motion Picture trust.

Q. Is that all that was said on the subject?

A. As far as that is concerned, yes—I mean the resolution at that time was to the effect that we assign the claim to J. H. Sampliner and it was accepted.

165 Q. Is that clearly correct, that at that time the discussion was to assign the claim in full for past services?

A. Yes, sir, and for any future services that might arise from the General Film Company or the Motion Picture trust.

Q. And that the assignment wiped out the existing debt?

A. Yes, sir.

By Mr. Rogers:

Q. Now, had Mr. Sampliner been paid for any of the services that he had rendered in connection with any of the matters concerning which the defendants in this suit or any of them are connected?

A. Had he been paid?

A. No, sir.

Mr. Rogers: I will take your Honor's suggestion in order to shorten the trial—shall I prove the services by him or by Mr. Sampliner?

The Court: Let Mr. Sampliner prove them, he wouldn't know.

Mr. Rogers: I now offer in evidence plaintiff's Exhibit I for identification.

Mr. Seabury: We make the same objection, and I urge this consideration additionally, that even if it were taken for services actually rendered, which does not now appear, because he says it was for services to be rendered as well, it appears that his particular purpose in taking it was to bring suit upon it, and I infer——

The Court: I will sustain the objection at this time. You may have an exception, and you may offer it again during Mr. Sampliner's testimony as you may be advised.

Mr. Rogers: May I have the opportunity at some time
166 during the trial to reply to the extended arguments which are being made now during the proceedings?

The Court: If I think it is necessary you can, and — I think not you cannot. I have taken briefs on both sides and communed with them over the week end.

Mr. Rogers: I have an exception to the refusal to admit the paper at this time.

Cross-examination.

By Mr. McCarter:

Q. I understand that you were the owner of one share of stock in this company?

A. Yes, sir.

Q. And that at about the time that the Mutual bought you out in March, 1912, you sold your share?

A. Yes, sir.

Q. Do you remember what you got for it?

Mr. Rogers: Objected to as immaterial.

The Court: The objection is sustained.

Q. Well, you really had no financial interest in the company, but were there as the friend of Mr. Mandelbaum?

Mr. Rogers: Objected to on the ground it has been shown that he was a director of the corporation, the secretary.
The Court: I will allow it.
Mr. Rogers: An exception.

Q. You were there as the friend of Mr. Mandelbaum?
A. Well, I was paid for being there as a friend.
Q. Your interest was merely nominal except as a friend of Mr Mandelbaum you were given the position of secretary and
167 for a while treasurer.

Mr. Rogers: I make the same objection.
Objection overruled. Exception.

A. I received $20 a week.
Q. I didn't ask you that. Was my statement of the case that you were put there by the friendship of Mr. Mandelbaum correct?
A. Yes, sir.
Q. How long have you known Mr. Mandelbaum?
A. About 15 years.
Q. How long have you known Mr. Sampliner?
A. Well, about pretty near 15 years.
Q. Did he request you to come here to New York from Cleveland?
A. Who?
Q. Mr. Sampliner?
A. Yes, sir.
Q. And he of course paid your expenses?
A. I expect him to, yes, sir.
Q. And you surrendered your duties as treasurer or whatever it is of the Burroughs Company while you came?
A. Yes, sir.
Q. Gave somebody the job of looking after your duties there?
A. Well, I will tell you——
Q. No, no, just answer the question?
A. Yes, sir.
Q. And when did you leave Cleveland, Mr. Sherman?
A. Thursday night.
Q. Been here ever since?
A. Yes, sir.
Q. Now before coming to New York on last Monday, I guess it was a week ago to-day, you were examined out in Cleveland, weren't you?
A. Yes, sir.
Q. And you had been subpœnaed to be examined on the preceding Saturday, hadn't you?

Mr. Rogers: May it appear by whom he was examined and who subpœnaed him?
168 The Court: No, he can ask his questions in his own way and if he omits anything you have a right to re-direct.

Q. You had been subpoenaed to testify on the preceding Saturday, hadn't you?

A. Yes, sir.

Q. And immediately upon having the subpoena served upon you you notified Mr. Sampliner, didn't you?

A. Not immediately, about two hours or so afterwards.

Q. And when it came Saturday and the time for the examination, you met in the office of the Notary, Mr. Chestnut?

A. No, sir.

Q. Hauxhorst's office?

A. Yes, sir.

Q. He is a lawyer in Cleveland, isn't he?

A. Yes, sir.

Q. And Mr. Sampliner was not your lawyer on that occasion, was he?

A. No, sir.

Q. Well, now, do you remember being requested to be sworn on that occasion?

A. Yes, sir.

Q. And do you remember Mr. Sampliner telling the notary when it was requested you be sworn in obedience to the subpoena, something like this——

Mr. Rogers: Before anything is read I object upon the ground that that is already disposed of by your Honor's order. I sent word to Cleveland that I would apply to your Honor to stay the examination, and I appeared before your Honor with Mr. Kingsley on Saturday morning and upon your Honor's statement that the notice was unreasonable as to time, I had caused through my office notice of the fact to be sent to Cleveland, and while we were waiting for your Honor's disposition of the matter and for me to send on word
1659 what your decision was, I had instructed that that examination should not proceed, and in pursuance of that that examination was held over. Now they propose to ask why he did not go on with the examination, and it is unfair and not proper cross-examination.

The Court: Let me see the deposition, Mr. McCarter.

Mr. McCarter: That is the portion, your Honor, underscored on the side.

The Court: The objection is overruled.

Mr. Rogers: An exception.

Q. Do you remember when it was proposed by the Notary that you should be sworn that Mr. Sampliner said, "I shall instruct my man not to testify."

Mr. Rogers: I object on the further ground that none of that deposition can be read in evidence on the ground that the witness is present, and under the rule a deposition of a witness can only be read when it appears that he is not present at the trial and at the time of the trial is more than 100 miles away.

The Court: That rule has no application to a cross-examination to test credibility which is the sole purpose of this. The jury is in-

structed that his failure to testify on the day in question is a matter of no consequence. The examination is not directed to that at all.

Mr. McCarter: Entirely irrespective of that.

Mr. Rogers: An exception.

170 Q. When the Notary requested you to be sworn on that morning in obedience to the subpœna which had been served on you, about which in two hours you notified Mr. Sampliner; do you recall before the Notary in Mr. Hauxhurst's office, do you recall when Mr. Hauxhurst said that the mere fact that some proceedings were pending in New York did not stop the taking of the depositions, Mr. Sampliner replied, referring to you, "I shall instruct my man not to testify."

Mr. Rogers: I object on the further ground that anything that Mr. Sampliner said at that meeting is immaterial and incompetent.

Objection overruled; exception.

Q. Do you remember that?

A. Mr. Hauxhurst did not ask me.

The Court: No, no, did Mr. Sampliner say that?

The Witness. Words to that effect. Whether he said that or not, I don't know.

Q. And did the Notary then say to you, "Will you please rise and be sworn, Mr. Sherman," and did you reply, "I refuse to be sworn?"

Same objection, ruling and exception.

The Court: It is solely for the purpose I have heretofore indicated.

Q. Now on Monday you were sworn, weren't you?

A. Yes, sir.

171 Q. I think you told us here the other day that prior to that day, that is on Friday, you had not seen this minute book in several years?

A. Not from the time Mr. Frueher took it.

Q. Had you seen it before you went on the stand on Friday?

A. No, sir.

Q. So when you were in Cleveland on Monday and you testified you had not seen the minute book, you had not seen it for some time, had you?

A. No, sir.

Q. Now, when Monday came around and you did testify you swore, did you not as follows:

The Court: Just mention the page so Mr. Rogers can get it.

Q. I am referring to the bottom of page 25, "Can you state approximately what the date of that meeting was," namely the meeting at which this authorization was executed and this assignment was made, and your reply is, "Around the first of December, 1911;

might have been December 5th, 10th, or 15th." Did you testify to that?

A. I think I did, yes, sir.

Q. Then so far as you recall——

A. It might have been later.

Q. Pardon me.

A. It might have been a few days later. I cannot remember the date.

Q. As far as you were able to recall, having had from Saturday until Monday to confer with Mr. Sampliner and Mr. Rogers, when on Monday you were asked when that meeting occurred your reply was that it might have been December 5th, 10th or 15th.

A. I had not conferred with Mr. Rogers.

Q. You had not?

A. No, sir.

Q. Had you conferred with Mr. Sampliner?

A. Not in regard to the minute book, no, sir.

172 Q. I am not asking about the minute book, the meeting?

A. No, sir, about the meeting I did.

Q. Do you mean to tell me that you have not been told by anybody that you were to be asked about that meeting?

A. No, sir.

Q. Not a soul told you?

A. No, sir.

Q. At any rate, whether they told you or not, your best knowledge and belief was that the meeting might have occurred as late as the 5th, 10th, or 15th?

A. Yes, or the 20th.

Q. When you saw the minute book what made you change your mind?

A. About what?

Q. As to when it did occur?

A. I have not changed my mind.

Q. Didn't you testify the other day that it took place the last of November or the first of December?

A. So far as my memory was——

Q. What?

A. I do not know which meeting Mr. ——

Q. No, wait a minute. Didn't you testify here on Friday that the meeting took place either the last of November or the first of December?

A. Or around the first of December.

Q. Will you please answer my question?

A. I might have testified to that.

Q. Didn't you testify here on Friday——

A. Yes, sir.

Q. (Continuing) That the meeting took place either the last of November or the first of December?

A. Testify here.

Q. Here on Friday?

A. Not that I remember, no, sir. Mr. Scull asked me that question in Cleveland and I think that is where I stated——

Mr. Rogers: What page do you say he testified that Friday?
Mr. McCarter: I have the witness' answer.

173 The Court: He does not need to tell you at the time being.
Mr. Rogers: I submit there has been no such testimony.
The Court: Very well, that will all come out. You can only try a law suit step by step.
Mr. Rogers: Cross-examination cannot be based on testimony that has not been given.
The Court: Objection overruled.
Mr. Rogers: An exception.

Q. Now you have looked into this minute book, haven't you?
A. Yes, sir, in the past few minutes, yes, sir.
Q. Your handwriting is the handwriting which contains the minutes of—which represent the minutes of the previous meetings there?
A. Most of them, yes, sir.
Q. Is there any minute as long as you were secretary that is not in your handwriting?
A. Yes, sir.
Q. I understood you to say that this meeting which you say now occurred May 29th, occurred about December 5th, 10th or 15th, was called by you. Who told you to call it?
A. Mr. Mandelbaum, the president.
Q. Told you to call it?
A. Yes, sir.
Q. At that time had the paper been prepared which was subsequently signed?
A. At the time the meeting was called? No, sir.
Q. When did you first see the paper that is produced here, the assignment?
A. The only way I can answer that is by the date on the paper, December 28th.

Q. Do you know, if the meeting occurred as you said out
174 west, the last of November or the first of December, and as you say here either the 5th, 10th or 15th of December, why so long a time elapsed between the alleged meeting and the actual execution of the papers?

Mr. Rogers: Objected to as immaterial and the form of the question is argumentative.
The Court: I will sustain the objection.

Q. Do you know why so long a time elapsed between the date of the meeting whenever it was and the date of the execution of the papers?

Mr. Rogers: The same objection.
The Court: The question may be "Do you know why the time elapsed."

Q. Do you know why the time between November 30th, if tha were the date, or December 1st, if that were the date, or Decembe 5th, 10th, and 15th as you said on Friday was the date, why tha time elapsed to the 28th?

Mr. Rogers: I object to the form of question.

The Court: The objection is overruled. He has followed my sug gestion, I think.

Mr. Rogers: I object also on the ground that it is not based upo the witness' testimony. He said here it might have been a few day later.

The Court: Include that.

Q. Or a few days later, if you will?

Mr. Rogers: I except.

The Court: You may answer.

175 A. We had a meeting first——

Q. That is not the question.

Mr. Rogers: He asked why?

The Court: Why did some time elapse between whenever th meeting was and the 28th of December, which is the date of Plai tiff's Exhibit 1 for Identification?

The Witness: Before the paper was signed, is that what yo mean, from the time of the meeting?

The Court: Yes.

The Witness: Why, there was only two or three days elapsed.

Q. Do you put the meeting as late as December 25th?

A. It might have been as late as December 24th, and then th paper signed afterwards.

Q. Now if you say it might have been as late as December 24 or 25th why on Friday did you tell us that the meeting took pla around the first of December, might have been December 5th, 10 or 15th?

Mr. Rogers: I object to the form of the question on the groun that it is argumentative.

The Court: The objection is overruled.

Exception.

Q. (Last question repeated.)

A. Around the first of December; it might have been the 5th the 10th. The first of December doesn't necessarily mean the fi day as I take it.

Q. Now, Mr. Sherman, will you tell me what then happened the history of the Lake Shore Film Company so importa

176 as the assigning of a claim for $750,000 to a lawyer?

Mr. Rogers: I object to that question as intended to prejudice th jury and I am going to ask your Honor to withdraw a juror. Th face of the assignment contains no such statement as $750,000.

ays for value received. There was no intimation at that time that damage of $750,000 was claimed.

The Court: The motion to withdraw a juror is denied.

Exception.

The Court: Counsel will reframe the question. You may ask im why so important a matter as the assignment of a cause of ac- ion against what he calls the motion picture trust, and so forth.

Q. Can you recall anything that happened in the month of De- ember, or if you will the month of November, 1911, to the Lake hore Film Company as important as the assignment of this claim r damages that you have been referring to?

A. The only reason I can state.

Q. No; can you remember anything so important that happened that company's history during those months?

Mr. Rogers: I submit he should be allowed to answer the ques- on.

The Court: Proceed and answer the question.

A. I did not quite get the question.

The Court: Can you recall anything equal in importance that happened during that period of time?

A. I have said it was hard up right along. At the end of each month—our finances were lower at that time—I guess at was all that worried me.

The Court: You were getting harder up all the time?

The Witness: Yes.

Q. Now you had in the previous May declared a dividend for 0,000, hadn't you, May 8th, 1910?

A. May, 1910?

The Court: That is the answer?

The Witness: No, sir; I do not remember.

Q. On May 1st, 1911, you did?

The Court: It is May, 1911, instead of 1910.

Q. Now, changing the date, 1911, I ask you if you did not declare dividend in May, 1911, of $10,000?

Objected to. Objection overruled. Exception.

A. Not $10,000. We never declared a dividend of 100 per cent.

Q. I call your attention to an entry on the minute book on page signed somebody Sherman Secretary. Is that your signature?

A. Yes, sir.

Q. Don't you find there the fact that you declared a dividend of 0,000?

Mr. Rogers: I object on the ground that this is col-
178 lateral matter. He is making this witness his own wit-
ness, and on the ground that the book is the best evidence
but I claim it is immaterial.

The Court: It is collateral, but it is to test the witness' memory
The objection is overruled.

Q. You find that to be true, do you not?

A. Yes, sir.

Q. You find at the same date there is an entry of a sale by the
company of its Columbus, Ohio branch, don't you?

A. Yes, sir.

Q. From which the company realized $9,000?

Mr. Rogers: Objected to on the same grounds.

Objection overruled. Exception.

A. Yes, sir.

Q. Those events were important enough for you to enter up in
that book, weren't they?

A. Yes.

Q. And yet the entry of the assignment by this company of its
claim against what you call the motion picture trust was not of
sufficient importance to enter into the book?

A. Yes, sir, it was important.

Q. Well, you had the book?

Mr. Rogers: I object on the ground that the witness testified Sa-
urday that he has written this out and it was in the book in table
form but he had not transferred it, and it is now missing.

Objection overruled. Exception.

Q. You had the book in your possession from December 28th to
March 12, didn't you?

A. Yes, sir.

179 Q. That is nearly three months, isn't it?

A. Yes, sir, but——

Q. And you hadn't time in the three months that that book
remained in your possession to enter that little resolution the im-
portance of which we can understand?

A. The difference in that is——

Mr. Rogers: I object to the form of the question.

The Court: Strike out "The importance of which we can under-
stand."

Q. You had not had time in those three months to transcribe
from your little pad into the book the fact that your company had
assigned that claim to Mr. Sampliner?

A. When you speak about May, May is a dull season for our com-
pany. December and March are busy months, and I did not have
the time.

Q. Didn't have the time?

A. No, sir.

Q. Was there any other business transacted at this meeting which you tell us might have been the last of November or the first of December, December 5th, 10th, 12th or 24th, was any other business transacted at that meeting than the assignment of this claim to Mr. Sampliner?

A. No, sir.

Q. And the resolution that you have described, namely, Resolved, that we assign to Mr. Sampliner our claim against the motion picture trust, that was passed, and you did not in the three months that elapsed, nearly, have time to enter that up in the book?

Objected to as immaterial.

Objection overruled. Exception.

180 Q. You had not had time to do that?

A. I might have had time but I didn't do it.

Q. You might have had time. You weren't so busy you could not have written those four or five lines, were you?

A. I might have.

Q. Your salary was going on at $20 a week all this time?

A. Yes, sir.

Q. What duties as secretary were you performing for this concern at $20 a week that you could not write that little resolution in that book in its place?

A. My salary was not for acting as secretary.

Q. What was it?

A. To help the bookkeeper and accountant out off and on.

Q. You had been treasurer, had you?

A. No, secretary.

Q. Hadn't you been treasurer?

A. No, sir.

Q. Mr. Mandelbaum was treasurer?

A. Mr. Mandelbaum was treasurer..

Q. Did you keep the books of the concern?

A. No, sir.

Q. Then I ask you what duties you did perform from November 20th, or December 1st, 5th, 10th, 15th, or December 24th, down to March 8th, for which you charged and were paid $20 a week, that you could not find occasion to write that little resolution in the book?

A. Well, I think I kept about—let's see—I think I had about 12 different sets of books I was keeping.

Q. For whom?

A. For different companies.

The Court: Will you let me interrupt you a moment?

Mr. McCarter: Certainly.

By the Court:

Q. You cannot put the date of this meeting very clearly, as I understand?

A. No, sir.

181 Q. It might have been towards the end of December.

A. Yes, sir.

Q. Now, did you write on every page of this minute book?

A. Outside of when the company was incorporated I think the attorney wrote in the first few pages in the incorporation. Practically all of the meetings we had outside of the last two or three I wrote in, yes, sir.

Q. Did you leave any blank pages, that is what I am after?

A. No, sir.

Q. You are sure about that?

A. Positive.

Q. Are there any blank pages in the book; I do not mean at the last end of the book; I mean in the front of it?

A. Not that I know of.

Q. Pretty sure about that?

A. I could not remember now at this late date, but I don't think there was any blank; there might have been one.

Q. Look at page 16. Is that a blank page?

A. Yes, sir.

Q. Look at page 20. Is that a blank page?

A. Yes, sir.

Q. Now you see the heading on page 16 is "Minutes of First Directors' Meeting." Do you see that?

A. Yes, sir.

Q. Now that is a printed heading?

A. Yes, sir.

Q. And you see that heading starts on page 14?

A. Yes, sir.

Q. Now, before that are various headings printed, aren't there?

A. Yes, sir.

Q. Called proceedings of the incorporators and minutes of the first stockholders' meeting?

A. Yes, sir.

Q. Now at page 16 you still have a heading "Minutes of First Directors' Meeting," have you?

A. Yes, sir.

182 Q. Do you know how many pages that contained? Pages 17 and 18 are torn out. Do you know whether minutes of first directors' meeting were taken on 17 and 18, that is that printed heading?

A. I presume it was.

Q. What is your recollection?

A. I should say they were.

Q. You should say they were?

A. Yes, sir.

Q. Well, now, all these meetings that were held after the first

directors' meeting were of course not the first directors' meeting, were they?

A. No, sir.

Q. And page 19 starts in printed matter, "Minutes of (blank) meeting of the (blank) company held at (blank) 19 (meaning the year), so you could not — ('06, '07 or '08) or whatever it was in there?

A. Yes, sir.

Q. Now do you note that on page 19 the reference to minutes of a stockholders' meeting held on December 10th, 1908?

A. Yes, sir.

Q. Well, now in view of your impression that pages containing the heading minutes of first directors' meeting succeeded page 16, and that the first meeting of the stockholders ended on page 19, what do you say now as to whether those two pages which were torn out contained any entry about the assignment?

A. No, they could not contain anything about the assignment.

Q. So that pages 17 and 18— —

A. Would have nothing to do with the assignment at all.

Q. Nothing whatever?

A. Nothing whatever, no, sir.

Q. So there is nothing in that, is there?

A. No, sir.

By Mr. McCarter:

183 Q. You called our attention, including the jury's attention, Friday, to the fact that some pages were torn out of the minute book, didn't you?

A. No, sir; I did not.

Q. Didn't you testify to that?

A. I testified about it, but I did not call attention to it.

Q. You didn't mean the jury to infer that those pages could possibly have any reference to the transactions in December, 1911?

A. I did not.

Q. No, they could not possibly, even supposing they were torn out since the book left your possession. They must have referred to a period of long anterior to 1911?

A. Yes, sir.

Q. You don't find anything torn out in December, 1911; the pages fall in regular sequence after each other, don't they; just look at the numbers of the pages?

Mr. Rogers: I object to this line of examination upon the ground that counsel should offer the entire book or specific pages, and I object to his getting into the record this line of matter in that way.

The Court: Objection overruled.

Exception.

Q. You may answer the question. You do not find any break in the sequence of pages during the month of December?

A. No, sir.

Q. So that all the pages that pertain to the period November and December, 1911, and January and February, 1912, are in that book, aren't they?

A. Yes, sir.

Q. Now I want to find out where the office of the Lake Shore Film Company was in December, 1911?

A. It was in the Columbia Building.

The Court: Cleveland?

The Witness: Cleveland, yes, sir.

184 Q. In the Columbia Building. And is that where you performed your duties in connection with that company?

A. The Superior Building and then the Columbia Building later on.

Q. They moved from the one to the other?

A. Yes, sir.

Q. And as they were in the one or the other you performed what duties you had to perform in connection with this company in that building?

A. Yes, sir.

Q. You had your desk there?

A. Yes, sir.

Q. Did you have the custody of the seal?

A. Yes, sir.

Q. And you continued in custody of that seal until March, 1912, didn't you?

A. Yes, sir.

Q. And did I understand you to say a little while ago that you used to assist on the books of account of the Lake Shore Film Company?

A. Yes, sir.

Q. And that would be done in the office of the company?

A. Yes, sir.

Q. They had a regular bookkeeper, didn't they?

A. Yes, sir, they had two.

Q. And your functions as secretary did not require you to do any work on the books; that was simply because you were accommodating?

A. No, I practically signed one half of the checks that were paid in payment of accounts.

Q. But I am talking about the books?

A. I used to check up on the bookkeeper and the cashier.

Q. Now while you were going to the office for the purpose of checking up on the bookkeeper and cashier you never thought it worth while during those three months to write up that little minute in the books?

185 A. I told you I had ten or twelve other sets of books I had to keep besides these.

Q. You used to go every day to the office of the Lake Shore Film to sign checks and do your other duties, and during those three months you never found time to write that up?

A. I might have let it be there for six months.

Q. Do you remember you testified the other day that sometimes you left resolutions sometimes as long as a month?

A. Yes, sir, and longer.

Q. I ask you if you remember telling us the other day you waited sometimes as long as a month?

A. Yes, sir.

Q. You didn't say longer then. Of course you say it now.

Mr. Rogers: When the witness gives his answer——

The Court: Do you remember saying longer the other day or did you confine your recollection to a month?

The Witness: I think I said a month or sometimes two or three meetings would be gone by before I would write them up.

Q. Again I ask you if you can recall anything so important to the Lake Shore Film Company as the assignment of its claim for treble damages under the Sherman Law?

A. I do not catch that question.

Q. Well, you entered in the minutes the purchase of the Columbus, Ohio, branch and you entered in the minutes its sale for $9,000, didn't you?

A. Yes, sir.

Q. You entered in the minutes the resolution to pay a dividend of $10,000 didn't you?

A. Yes, sir.

186 Q. In the minute book?

A. Yes.

Q. You entered in the minute book on page 34 the resolution imposing in Mr. Mandelbaum authority to carry out the sale of the Columbus, Ohio, branch, which resulted in getting $9,000, didn't you?

Mr. Rogers: I object upon the ground that if the evidence is admissable that the book itself ought to go in evidence. The gist of my objection is that it is entirely immaterial.

The Court: I will allow it on the question of credibility.

Mr. Rogers: It is a method of getting into the record by parol immaterial testimony.

The Court: The objection is overruled.

Mr. Rogers: An exception.

Mr. McCarter: If I can offer the books on cross-examination we are quite ready to do so. I had supposed that was not proper practice.

The Court: So had I .

Mr. Rogers: Are you sincere about that?

Mr. Carter: I offer the book in evidence.

The Court: If there is no objection I will receive it.

Mr. Rogers: I am not objecting to the book going in, but may I preserve my rights that if the evidence is admissible then I have no objection to the book being received, but I want to preserve my

objection that the contents of the book and the matters in-
187 quired about are incompetent, irrelevant and immaterial to the issues we are trying here.

The Court: I cannot take a qualified concession. The cross-examination is based upon a perfectly simple principle of law. The witness says that a certain meeting took place at a time which he is unable definitely to fix, and that certain matters took place at that meeting. Now it is perfectly competent for counsel to cross-examine for the purpose of testing his memory, and in that connection call his attention to other relevant things. Counsel would have no right over objection to introduce the book. He has the right to ask anything relevant tending to test the memory of the witness. I am willing to let the book in if the concession is unqualified, but if surrounded with conditions I will not permit it.

Mr. Rogers: In view of the fact that there has been some merriment at the counsel table on the other side, and so that the jury will not misunderstand my position, may I say this to your Honor. Our contention is now and has been that it is perfectly immaterial so far as this assignment goes what took place at that particular meeting or at any meeting. That the assignment itself upon the face of it purports to be the act of the corporation and is binding upon these defendants. Now if I unqualifiedly permit the book to go in evidence without reserving that objection I may be deemed to waive my point. With that understanding I am willing that the book should go in evidence, but I want to preserve
188 that objection, and I submit, your Honor, I have a right to that.

The Court: There is no question about your right to preserve any right that you have. I decline to permit the book unless the concession is absolute. And with respect to your suggestion as to the assignment, unless it be—I am not at all clear that that is so—that the seal operates as a self-proving means there is no proof of the execution of this assignment. There is no acknowledgment, there is nothing to indicate authority. It is a piece of paper signed by Mandelbaum and somebody else; that is all it is, who purport or say they are officers. In the condition in which that assignment is I am taking all the testimony to show all the surrounding circumstances. Further than that, quite irrespective of the technique of the assignment, I am taking the testimony to show what was the situation, what was it that was assigned, and under what circumstances was it assigned, and lastly, was it assigned in point of fact. Now, you may have an objection and exception to my rulings as we go along.

Mr. Rogers: I submit that a man who was present at the meeting testified to that.

The Court: He does not testify to that.

Mr. Rogers: He executed it as the secretary of the corporation.

The Court: I am not going to be technical about that e-
189 cause I am more concerned about the more important fundamental question in the case.

Mr. Rogers: I do not want to create the impression that I am tryin

to keep any testimony out of the case which the jury should have legally, and I would like to have your Honor instruct the jury that I am within my rights when I preserve my objection that nothing that is in that minute book is pertinent here.

The Court: You are within your rights.

Mr. McCarter: The book is neither in nor out.

The Court: The book is out until the concession is absolute.

Q. Have you been told since you were in New York that Mr. Sampliner is claiming $750,000 in this suit?

A. No, sir.

Mr. Rogers: Objected to as immaterial.

Objection overruled. Exception.

Q. Have you been told that he has stated in his complaint in this case that the Lake Shore Film Company actually suffered in a loss to its business of $250,000, and that under the Sherman—look at the jury or at me and not over there.

Mr. Rogers: I object to that as an unfair statement.

The Court: Finish your question.

Q. Have you learned since you were in New York that Mr. Sampliner in his complaint claims that the company of which you were secretary had actually suffered a loss of $250,000, and that——

180 Mr. Rogers: Wait a minute.

Mr. McCarter: Let me finish, if you please. You interrupt every question I put with a stump speech.

Mr. Rogers: You dropped your voice and I thought you had finished.

The Court: Now that war is over, go on.

Q. Have you learned since you were in New York, coming here on purpose to testify in this case that Mr. Sampliner states in his complaint that the company of which you were secretary suffered an actual loss of $250,000 and that under the Sherman law he was entitled to claim three times that or $750,000.

A. No, sir.

Mr. Rogers: Objected to as immaterial and incompetent.

Objection overruled. Exception.

Q. You say no to that?

A. Yes, sir.

Q. When did you first learn of the extent of Mr. Sampliner's claim?

A. This is the first time I have heard of any $750,000——

Mr. Rogers. Wait. I object upon the same grounds.

The Court: The same ruling.

Exception.

Q. When did you first learn——

A. About this $750,000.

Q. Or the $250,000, either one?
A. When the figures were mentioned in court here Friday.
Q. You prior to that time during the time negotiations were going on or during the time that you were having these conferences or meetings when the subject of assigning to Mr. Sampliner was brought up had no interest in knowing what the extent of your claim was.

191

Same objection. Same ruling and exception.

Q. (Last question read.)
A. No, sir; I had no interest in that whatever.
Q. You know whether at that time negotiations for the sale of your stock and to the people that later bought it had been opened; it was about that time, wasn't it.

Mr. Rogers: Objected to as incompetent, irrelevant and immaterial.
Objection overruled. Exception.

Q. About that time were negotiations commenced with the Mutual Film people?
A. I think it was after.
Q. How long afterwards?
A. Let me see, it was in March, 1912.
Q. They were consummated then but were they not commenced earlier?
A. I think it was January or February; I think it was in February they started.
Q. Did you conduct any of these negotiations?
A. No, sir.
Q. At any rate you didn't tell anybody so far as you were concerned who was negotiating to purchase the stock of your company that your company had sold to Mr. Sampliner a claim for damages, did you?

Mr. Rogers: Objected to as incompetent.
The Court: The objection is sustained. I think that is immaterial.

192

Q. Who first brought up the fact that Sampliner had a claim against the company for services that he had rendered, who first brought that to your attention?
A. Well, I knew that myself without anybody bringing it to my attention.
Q. I understood you to say that that claim covered the work that he had performed—covered compensation for the work he had performed in advising this company for the last year or two?
A. Yes, sir.
Q. With reference to its connection with what you called the moving picture trust, is that right?
A. Yes, sir.
Q. And I understood you to say that that claim amounted to some ten or twelve thousand dollars?

A. Yes, sir.
Q. Who told you that?
A. Mr. Mandelbaum reported that at our meeting when we talked over and made the resolution to assign the claim to Mr. Sampliner.
Q. You stated to Judge Mayer that you had never seen any written paper for that claim?
A. Yes, sir, I so stated.
Q. Have you ever read the complaint in this case?
A. No, sir.
Q. Are you aware that the written complaint with reference to that claim is as follows:

The Court: What paragraph?

Q. Paragraph 125. "That by reason of the acts and conduct of the defendants, and in order for the Lake Shore Company to have proper guidance and as a necessary part of its business management, because of the acts of the defendants directed against it in 193 carrying out the plan and conspiracy aforementioned, it became necessary for the Lake Shore Company to be advised by counsel and to have legal advice"
A. Yes, sir.
Q. "to the end that their rights might be protected that they might be informed as to the proceedings against it and their legal rights in the controversy. That therefore, from on or about August, 1910, to March 7th, 1911, the said Lake Shore Company did employ legal assistance and service." Now that is what you have been referring to as the legal assistance of Mr. Sampliner, isn't it?
A. No, from July, 1910 to December——

Mr. Rogers: Mr. McCarter has read from August, 1910, to March, 1911. This is improper in form because this witness has testified that services were rendered by Mr. Sampliner up to the time of the assignment, and I object to the form of the question.
The Court: I think the question is objectionable. Mr. McCarter has read from Mr. Sampliner's complaint as we call it, that is the paper in which he sets forth his cause of action, and in that it appears that there is a claim for service from about August, 1910, to March 7th, 1911?
The Witness: Yes.

By the Court:

Q. Now, as I understood you to say his services ran down to December?
A. December, 1911.
Q. December, 1911?
A. Yes, sir.
Q. Did he do any services between December and March 194 that you know of?
A. March, 1911, yes, sir.
Q. From December to March?

Mr. McCarter: It is the other way.
The Court: From March 7th to December, 1911?
The Witness: Yes, sir.

By Mr. McCarter:

Q. What services that you personally know of from March, 1911, to December, 1911?
A. One I remember was consulation about what action we would have against the Motion Picture trust.
Q. Do you remember anything else?
A. Yes, we expected the trust——
Q. I am asking you what——
Mr. Rogers: I submit that this witness has a right to make his answers.
The Court: No, he cannot say he expected. That is as simple a simple can be. He must say what other services.

Q. What other services between March, 1911, and December of the same year did Mr. Sampliner render to this company that you know of with reference to this matter besides one consultation with reference to your claim against the trust?

Mr. Rogers: I object upon the ground that this witness has not said there was one consultation.
The Court: I so understood him. If he did not say so he can correct it.
The Witness: I said one that I remember of.

195 Q. I have asked you three times and I will repeat it. What other thing do you remember that he did?
A. He had various conferences with Mr. Mandelbaum I think and on two or three occasions I went to his office in regard to securing a bond for us providing the trust tried to take our films away from us.
Q. That was between March and December?
A. Yes, sir.
Q. Do you remember anything more?
A. No, I don't know as I remember other meetings.
Q. Now you said he advised you in reference to your claim. Did he advise you he had a good claim.
—. He advised Mr. Mandelbaum in that matter and Mr. Mandelbaum advised the Board of Directors.
Q. You said a little while ago that one of the things that he did between March and December, 1911, was to advise the company that it had—in reference to this claim?
A. Yes, sir.
Q. Were you present when he delivered the advice?
A. Not—Mr. Sampliner told me we had a claim against them, yes, sir.
Q. Were you present when Mr. Sampliner gave the board of directors or the officers of the company that advice?
A. He was not at the board of directors meeting to give the board that.
Q. Were you present when the advice was given?

A. He advised me personally, yes.
Q. You personally?
A. Yes, he advised all of us personally.
Q. He advised you. Who else was present?
A. Mr. Mandlebaum was present and Mr. Schachtel and Mr. Diener.

196 Q. I am asking about the conference when you said that one of the things he did between March and December was to advise you with reference to this claim. Was there more than one of those conferences.
A. So far as I can remember I think there were.
Q. What advice did he give you about it?
A. That we had a good claim.
Q. A good claim?
A. Yes, sir.
Q. For how much?

Mr. Rogers: Objected to as immaterial.
Objection overruled. Exception.

A. For how much?
Q. Yes.
A. He could not tell, nor could any one tell at the time.
Q. Did he tell you that the claim was supposed to be the injury you had suffered.

Mr. Rogers: I object on the ground that this is immaterial.
Objection overruled. Exception.

Q. (Last question read).

The Court: "You" means the company.
The Witness: Yes, sir.

Q. But no one could tell what that amounted to among you, could you?
A. Yes, sir, I could tell.
Q. You could tell?
A. Yes.
Q. From the books?
A. From the books.
Q. Did the books contain any account with Mr. Sampliner?
A. On his petty work, yes, sir.

197 Mr. Rogers: Objected to.
Objection overruled.

Q. You mean on these little outside matters he had advised about and for which he was paid.
A. Questions of chattel mortgages on machines and such things. We paid him a small retainer for that.
Q. You had a standing account with him on those matters, and those matters were all paid up as I understand you, is that right?
A. On petty matters, yes, sir.
Q. How did it happen that you had this standing account with

him on these so-called petty matters which were all paid up and you never had any account with him upon matters that aggregated as you say $10,000, or $12,000 about this same subject.

Mr. Rogers: Objected to on the ground that the witness has testified no bills were rendered. I submit that the form of the question is improper.

The Court: Objection sustained.

By the Court:

Q. Did you at any time figure upon your books what injury if any was done to your company?

A. Yes, sir.

Q. And did you give that to Mr. Sampliner?

A. Yes, sir.

By Mr. McCarter:

Q. When did you make that figuring up?

Mr. Rogers: Objected to as immaterial and incompetent.

Objection overruled. Exception.

198 By the Court:

Q. When did you make that and give it to Mr. Sampliner?

A. I don't remember just when it was. It was sometime after the assignment. I started in with the bookkeeper to help first to compile the figures in the book.

Q. Was it before you ceased connection with the company?

A. Yes, sir.

Q. Well, when was it?

A. It must have been I think I started in in January or February, 1912, and compiled the figures if I am not mistaken.

Q. Then if I understand you correctly at the time this paper was delivered December 28th, you didn't know what the damage was?

A. No, sir.

Q. Did any one else connected with the company so far are you know?

Mr. Rogers: May I object to your Honor's question on the same ground and have an exception?

The Court: Certainly.

Q. What is the answer? On the 28th day of December, 1911, Plaintiffs Exhibit 1 purports to be executed. That is the paper you executed with Mr. Mandelbaum. At that time did you or so far as you know any member of the board of directors of the company know what the damage to the company was?

A. Yes, sir, I knew. I could not state just when I started in on compiling those figures.

Q. You say you knew what the damage was?

A. I had figured it up, yes, sir.

Q. Before this assignment was executed?

A. I cannot say whether it was before or after now.

199 Q. You just said a few moments ago it was January and February?

A. I think it was January and February after the assignment that I started in but I am not positive.

Q. Did it take you a long while to do that?

A. I took three or four days.

Q. Three or four days?

A. I say days, evenings.

Q. Are you willing to state that you knew what the damage was when this was executed?

Same objection; ruling and exception.

A. The assignment was executed in December; and it was in January or February, I think I started in.

Q. So you didn't know what your damage was when the assignment was executed?

A. In actual dollars and cents I did not.

Q. That is what I am talking about?

A. No, sir.

Q. You considered that you were damaged?

A. Yes, sir.

Q. But you hadn't made any calculation to find out the amount of the damage at the time the assignment was made?

A. No, sir.

By Mr. McCarter:

Q. Was Mr. Sampliner present at the meeting that you have referred to that might have occurred either at the end of November or the first of December as you have testified in Cleveland or here as you testified on Friday on the 5th, 10th, 15th or as you have testified this morning as late as the 24th of December, was Mr. Sampliner present at any of those meetings?

A. No, sir, he was not.

200 Mr. Rogers: I object to Mr. Carter's stating on the record what his conception is of what a witness testified to in Cleveland. There is no evidence of that sort here and I object to the form of the question.

The Court: Objection overruled. Exception.

Mr. McCarter: Lest there be any misunderstanding I have here the original return of the Notary of what transpired out in Cleveland. The re-direct examination of William A. Sherman.

Q. I will ask you whether you were asked and answered the questions as I now read from this record:

"Q. Where was this meeting of the directors to which you have testified?

A. It was held at the office of the Lake Shore Film and Supply Company.

Q. "On what date?"
A. Well, I think it was held the first of December or last of November."

Now did you testify that way?

Mr. Rogers: I object. If the deposition is to be read at all the entire deposition should be read, and I have no objection to Mr. McCarter offering the entire deposition.
The Court: The objection is overruled. You may answer.
Exception.

201 A. I answer that way.
Q. Did you or did you not?

The Court: He says he did.

A. I did, yes, sir.
Q. Did you further swear in Cleveland a week ago today that the best of your recollection was that the minutes of that meeting were entered in the book?
A. Yes, sir, I did.
Q. You didn't say anything about a loose leaf not copied in the book did you?

Mr. Rogers: I submit that what he said in the deposition is the best evidence and I have no objection to the entire deposition being in evidence here.
The Court: I will allow the question.

Q. You didn't say anything about any lost minutes or loose sheet being left in that book, did you? Now answer that yes or no.
A. No.
Q. At Cleveland did you say a word about any loose leaves being left in the book and not being entered in the book itself?
A. I have answered Mr. Scull's question this way——
Q. Will you answer that question, did you or did you not?
A. No, I don't think I did.
Q. Now when were you first told or when did you first learn that the last minute in this book of any meeting to which your signature is appended is on December 4th, when did you learn that?
A. After I got off the witness stand here Friday.
Q. You have talked about your testimony that you were to give in this case since you came to New York?
A. I don't quite get the gist of your question.
202 Q. You have talked about what testimony you were to give in this case since you came to New York?
A. Talked about what testimony I was to give?
Q. Yes.
A. No, sir, why should I?
Q. Didn't you sit in that seat right there for half an hour with Mr. Sampliner with a memorandum in your hand while Mr. Kirlin was summing up to the other jury and his Honor, Judge Mayer was charging the jury, and weren't you and Mr. Sampliner talking

about your evidence in this case while we were waiting to get reached on Friday?

A. I asked Mr. Sampliner——

Q. Answer that, were you or were you not?

Mr. Rogers: Well, I submit he is answering.

A. I took up my deposition.

Q. What?

A. I asked for my deposition, if it was here and I asked Mr. Sampliner to get it and let me look at it. The object of that was that——

Q. Never mind what the object was. You did have a talk with him then and did read your deposition?

A. Not through, no sir.

Q. What?

A. Not through, no, sir; I didn't read it through, I noted the two corrections that were to be made, that is all.

Q. You heard that Mr. Rogers and Mr. Sampliner had this minute book in their possession on Thursday, didn't you?

A. No, sir, the first I see that minute book was here.

Q. I beg your pardon?

A. The first I knew of the minute book was here.

Q. You see, you are not answering my question at all. I asked you if you didn't hear or learn after you reached New York,
203 that Mr. Rogers and Mr. Sampliner had had this minute book in their possession in Mr. Rogers' office for two or three hours before you arrived here?

A. Before I arrived here—I met Mr. Rogers an hour or a half hour before I got here and we took the train and came right over to Court.

The Court: Listen to the question. It is a very simple one.

Q. Did you hear, after you reached New York, that Mr. Rogers and Mr. Sampliner had been afforded an opportunity to look at this minute book at Mr. Rogers' office for several hours; did you learn that?

A. No, sir.

Q. Didn't learn that?

A. No, sir.

Q. They didn't tell you they had seen the minute book?

A. No, sir.

Q. Do you mean to tell me that they didn't tell you——

Mr. Rogers: Pardon me, the witness is mistaken about that.

The Court: Well, that is no fault of yours.

The Witness: I didn't read the minute book over.

The Court: You are asked if this minute book was shown to you.

Mr. Rogers: It wasn't shown to him before that time.

Mr. McCarter: I submit, your Honor, that this man has no right——

The Court: Yes, that is very improper. I know you don't mean

to do anything improper, but it is very improper to interrupt
204 a witness whose credibility is being attacked. You must let him answer. Read the question.

Q. I want to know what the fact is?

Mr. Rogers: I want to call the Court's attention to the fact——
The Court: Not at all, it is very improper.

Q. I want to know what the fact is?
A. I never see that minute book——
Q. I didn't ask you that, I want to know what the fact is, listen, please, Mr. Sherman?
A. Yes.
Q. When did you first learn after you reached New York last week, that Mr. Rogers and Mr. Sampliner had seen that minute book?
A. At the time I was coming from Mr. Rogers' office here, that they had the minute book, that the defense had the minute book, that is the time.
Q. So your counsel was right when he said you were mistaken when you told us before that you had not learned that you had seen the minute book?
A. You asked me if I had seen the minute book.
Q. I didn't ask you anything of the kind, Mr. Sherman, I asked you when you learned that they had been seen it and you said you hadn't learned it at all?
A. When we were coming from— —
Q. Then your counsel arose and said you were mistaken, and now you say you were mistaken, and you say you heard about it coming up the street?
A. I did, yes, sir.
205 Q. Where, on Broadway?
A. When I was leaving Mr. Rogers' office.
Q. He told you he had seen the minute book?
A. He had seen the minute book.
Q. Was Sampliner with you?
A. Yes, sir.
Q. How did they happen to tell you that?
A. I don't know why they should tell me; they told me that they had seen the minute book, or the defense had the minute book, either one or the other, I don't know which.
Q. Why did you tell us that you hadn't talked over the minute book, before you got here?
A. I hadn't talked it over.
Q. You hadn't?
A. No, sir.
Q. You let them talk?
A. I don't know whether they talked it over or not.
Q. I mean in your presence, coming up Broadway?
A. I don't know, I got on the elevated train at Mr. Rogers' building and came right down here.
Q. Now, I want you to listen to this question, and I think it will

be the last one I will ask you; I want to ask you to answer it and answer it correctly; if it isn't true, after you got to New York and were told by Mr. Rogers and Mr. Sampliner that they had seen this minute book, you were also told that there were entries in this minute book as late as December 4, 1911, in your handwriting, in which no mention is made of this alleged assignment to Mr. Sampliner, and that because of that information you changed your testimony from November 30th or December 1st, which you gave in Cleveland, as the time when this thing was passed, to December 10th or 15th, or today, even, making it the 25th?

206 Mr. Rogers: Pardon me just a moment. I submit the form of the question is highly improper; the manner in which it is addressed to the witness is highly improper, and on the further ground it is argumentative and does not state the situation.

Overruled. Exception.

A. I can't remember all the dates.

Q. Is that the best answer you can give to us?

A. Yes, sir, I can't remember all the dates.

Q. Was there another attorney working for the company, a Mr. Schwartz?

A. I think Mr. Schwartz did look after a few little claims for us.

Q. Down to the time that you sold out?

A. No.

Q. And you kept an account, I suppose, with him?

A. I think that was a commission basis that we had with Schwartz.

Q. Well, you had something on the books to indicate it?

A. I think we would, yes sir—we would.

Q. Now I have before me this Cleveland record, and I want to ask you just one more set of questions.

A. Yes, sir.

Q. I ask you if a week ago today, in Cleveland, you were asked the following and gave the following reply, and don't answer till I finish:

"Q. Did you keep a minute book of the transactions of the board of directors at the meetings of the stockholders of the Lake Shore Film & Supply Company? A. Yes, sir.

207 "Q. Do you know where that minute book is now? A. No, sir.

"Q. Did you personally keep such a minute book, or were the minutes or such books prepared by others? A. I kept the book myself.

"Q. And did such minutes show complete and accurate reports of all the transactions of the board of directors? A. I think they did."

Mr. Rogers: Pardon me a moment——

The Witness: I said I think they did.

Q. Did you make those answers in reply to those questions?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial; if any part of the deposition is read the

whole of the deposition should be read. I have no objection to the entire deposition being put in evidence.

Overruled. Exception.

The Court: You may answer, did you make those answers?

The Witness: Yes, sir.

Q. The answer is yes?

A. Yes, sir.

Mr. McCarter: That is all.

Mr. Rogers: May I offer the whole of the deposition in evidence so that the court and jury may have it and the entire story as told by the witness the other day?

Mr. Seabury: I object.

The Court: Objection sustained.

Mr. Rogers: I except. May I have this deposition marked for identification?

208 The Court: Certainly, the Clerk will mark it.

Marked Plaintiff's Exhibit 4 for Identification.

The Court: Is there anything further you want to ask Mr. Sherman?

Mr. Rogers: Yes, sir.

Redirect examination.

By Mr. Rogers:

Q. You have been interrogated about some proceeding that took place at the office of the Cleveland lawyer for the defendants, Mr. Hauxhurst, on Saturday morning; had you been informed at that time that there was a proceeding pending before his Honor Judge Mayer, to postpone that examination, and was that the reason why Mr. Sampliner stated that you would not be sworn?

Mr. McCarter: Objected to.

The Court: Sustained, I will allow the first part of the question. You may say whether or not you had been informed that there was a proceeding before me in New York to postpone the hearing in Cleveland.

The Witness: Yes, sir.

Mr. Rogers: I offer in evidence a copy of the notice served upon me on May 25, 1917.

Mr. McCarter: I object to that as utterly irrelevant.

The Court: It may appear on the record that Mr. Rogers and Mr. Kingsley appeared before me on, what date was it?

Mr. Rogers: Saturday morning—I have your Honor's order here.

209 The Court: Give me the date, that is all I want.

Mr. Rogers: Saturday, May 26th.

The Court: Saturday, May 26th. Mr. Rogers applied for a postponement of the examination which was then set in Cleveland, for Saturday morning on the ground that he had been served with a notice of taking the deposition on Friday afternoon. After hearing

Mr. Rogers the court ordered that the examination in Cleveland should be postponed until Monday.

Mr. Rogers: May it also appear on the record that the purpose of that was to give counsel for the plaintiff an opportunity to be in Cleveland?

The Court: Yes.

Mr. Rogers: May I have your Honor's order to that effect on the record?

The Court: That is enough, I have stated it, nobody doubts it.

Q. Now, at the time when you were the treasurer of the Burrows Company, did that cover the same period when you were also acting for the Lake Shore Company?

A. No, sir.

Q. Do you understand my question?

A. I was not treasurer of the Burrows Company at the time.

Q. Were you connected with the Burrows Company?

A. Yes, sir.

Q. During the months from December, 1911, to March, 1912, inclusive?

A. Yes, sir.

Q. And were you regularly employed there?

A. Yes, sir.

Q. At stated hours?

A. Yes, sir.

2110 Q. In order to save time, may I ask you whether you were with the Burrows Company during the accustomed business hours from morning until evening?

A. Yes, sir.

Q. And was your connection with the Lake Shore Company incidental to your general employment?

Mr. McCarter: That is leading, if your Honor, please.

A. Yes, sir.

Q. Now, you have said something about December and March being a busy time of the year; just what did you mean by that?

A. Naturally the month of December with every business is heavy in the retail business; in the book business from the first of September to the first of April is our busy months.

Q. And were the Burrows people at that time and are they now large stationers and booksellers in Cleveland?

A. Yes, sir.

Q. Doing an extensive business?

A. Yes, sir.

Q. I want to ask you what your connection with the company was in the month of December, 1911, to March, 1912, inclusive?

A. I was acting as assistant credit man and general accountant.

Q. And during the period from December to March, 1912, in addition to the hours during which you were employed during the day for the Burrows Company, were there other times when your

employment with that company required your attention to the duties of the Burrows Company?

A. Yes, sir.

Q. Just tell us in a general way what that was?

A. Why, I would have to work a great many evenings at the Burrows Company. Take the month of December, pre-
211 tically, I might run over to the Lake Shore Company for about fifteen minutes and then come back and spend the rest of the evening at the Burrows Company's office.

Q. You said that there were about twelve concerns for which you were doing bookkeeping or with which you were connected from December to March, 1911; was that also an extra employment?

A. Yes, sir.

Q. I believe you were asked whether there were any other meetings from December 4, 1911, up to March, 1912, in addition to the meetings at which you say the matter of the assignment to Mr. Sampliner had been discussed. I am not quite certain as to whether you answered it a question to Mr. McCarter?

A. We had a directors' meeting, general directors' meeting before we had the meeting assigning the claim to J. H. Sampliner—that was in December.

Q. Are the minutes of that meeting in that book? I haven't looked to see.

Q. (Counsel hands witness book)?

A. No, sir, not in here.

Q. Were there meetings of the directors or stockholders, or both, after this meeting in December, 1911, at which the matter of the assignment of the claim to Mr. Sampliner had been discussed?

A. Yes, sir, there were meetings, directors' meetings.

Q. Are the minutes of those meetings in the book?

A. I don't see them—and I don't see our resignation as directors either, when we turned over our business to the Mutual.

Q. Was there a meeting held in or about the month of March, 1912, at which formal resignations were spread on the record?

A. Yes, sir.

212 Q. Or intended to be put on the records?

A. Yes, sir, there was a meeting.

Q. Do you find any record of that in the minute book?

A. No, sir.

Q. Had you made minutes of these various meetings?

A. Yes, sir.

Q. And were they in the tablet form that you have described to the jury?

A. Yes, sir, they were in tablet form.

Q. Something was said by Mr. McCarter about a declaration of a dividend in May, 1911. Do you know what that transaction was, Mr. Sherman; if you do, will you tell his Honor and the jury what it was?

The Court: What has that got to do with it?

Mr. Rogers: They have inquired about it.

The Court: Nobody cares whether the transaction was good, bad or indifferent; the only point is whether, if the matter is presented to the jury, they regard it as of sufficient importance to have had it impressed on his memory so as to say whether it was his habit to record important transactions, that is all. I am not going to permit any testimony as to the details of these transactions which are of no consequence in this law suit.

Mr. Rogers: May I submit this, your Honor. They have attempted to prove, and the object of the proof, as I understand it, was that in May, 1911, they declared a dividend; therefore it was improbable that in December, 1911, they didn't have the money with which to pay Mr. Sampliner, and therefore assigned the cause of action to him. That was my understanding of the reason that Mr. McCarter used this instrument in cross-examination; if he says he didn't, that that was not his purpose, I will take your Honor's ruling, but if he states it was his purpose I would like to show what the transaction was.

Mr. Seabury: Are we not entitled to any inferences that arise from the fact? Here is the declaration of a dividend——

The Court: If you can show that that is not so, go ahead, I will allow you.

Mr. Rogers: I want to show what the transaction was, if he knows; if he don't I will prove it by somebody else.

The Court: Go ahead.

Q. Do you recall what that transaction was?
A. We sold our Columbus branch out.
Q. I beg your pardon?
A. We had a branch exchange in Columbus and we sold it out.
Q. In what name was that branch conducted?
A. The Buckeye Lake Show Film.
Q. Was that a separate corporation?
A. Not originally, no.
Q. Well, at the time, in May, 1911, was it?
A. It was the Lake Show Film then.
Q. I beg your pardon?
A. We called it the Buckeye Lake Show Film then.
Q. What were the circumstances of this so-called sale of this show, was that a cash transaction or was it a stock transaction?
A. Practically a stock transaction.
Q. What was it?

214 Mr. Seabury: I object to that on the ground it is incompetent and immaterial and has no relevancy to the issue we are called on to try.

The Court: I will allow him to answer. You may answer.

Mr. Seabury: Exception.

A. Practically a transfer of the stock and consolidation with the Cincinnati concern.
Q. I don't hear you?

A. Practically the changing of names and consolidating with the Cincinnati office of the Buckeye Film Company.

Q. What was that $10,000 that you talked about or referred to in the minutes, page 35, if you know?

A. You mean how it was paid?

Q. What did that refer to, you?

A. Refers to a dividend of $10,000.

Q. Before you had entered these minutes at page 35 of the book, had you made a transcript?

A. Yes, sir.

Q. And what was the method by which you entered these minutes?

A. On a sheet of yellow tablet paper, or white; I put them in here and then when I had the time I would recopy them.

Q. Were those minutes on page 35 written on the date that the meeting was purported to have taken place?

A. I don't think so, no, sir—I know they were n't.

Q. Do you recall with regard to the services of Mr. Sampliner, that in the month of March, 1911, there was some action taken by the defendant, the Motion Picture Patents Company, with respect to the business of the Lake Shore Company?

Mr. McCarter: Objected to as immaterial and not re-direct examination.

215 The Court: I will allow it.

Mr. Rogers: Mr. McCarter went into the question of services.

A. The Motion Picture Patents Company had cancelled our license allowing the Motion Picture trust to ship us films.

Q. Do you recall the approximate date of that notice of cancellation?

A. We received the notice of cancellation about the middle of February, if I am not mistaken.

The Court: What year, Mr. Sherman?

The Witness: 1911.

Q. In any event did the cancellation become effective at a time subsequent to the date of the notice?

A. The license was cancelled in March.

Q. At or about the time the notice of cancellation was received, was Mr. Sampliner called in conference?

A. Yes, sir.

Q. Did you have occasion to confer with him at or about that time with respect to the affairs of business of the corporation?

A. Personally, no.

Q. Who was the man in the corporation who was actively in charge?

A. Mr. Mandelbaum usually conferred with Mr. Sampliner.

Q. And who was the officer of the corporation that had general supervision and general management of its business affairs?

A. Mr. Mandelbaum.
Q. Who did you take your directions or instructions from?
A. Mr. Mandelbaum.
Q. And who did the other employes get their instructions
216 or directions from?
A. All from Mr. Mandelbaum, every one.
Q. Did any of the other officers and directors participate actively in the management of the business of the corporation?
A. No, sir—well, Mr. Joe Dieter did.
Q. What did Mr. Joe Dieter do?
A. Well, he was a booking agent and acted as assistant manager while Mr. Mandelbaum was out of town, to look after the employees.
Q. Who was to look after the employees?
A. Mr. Joe Dieter.
Q. Excepting during the absence of Mr. Mandelbaum, did any other person exercise any supervision or direction over the employees of the company?
A. No one outside of Mr. Mandelbaum.
Q. So far as you know, who of the officers of the corporation took care of its finances or the financial management of the corporation?
A. Mr. Mandelbaum.

Mr. Rogers: That is all.

By Mr. McCarter:

Q. Is he in Court, Mr. Mandelbaum in Court?
—. He was here awhile ago.
Q. What time of day were these meetings you refer to?
A. Usually in the evenings.
Q. I am asking you of the meetings that were not entered in the book at which the subject of this assignment came up?
A. They would have to be in the evening.
Q. I don't care what they would have to be. I am asking you when they were?
A. In the evening.
Q. In the evening?
A. Yes, sir.
217 Q. At the company's office?
A. Yes, sir.
Q. Did you read the minutes of the previous meetings?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. Well, did you or didn't you?
A. Yes, sir, as a rule.
Q. I am not asking you as a rule. I am asking you about these meetings that we are talking about: did you read the minutes of the previous meetings?
A. Yes, sir.
Q. What.

A. Yes, sir, even when I would have to read them off my memorandum.

Q. Mr. Sherman, who drew the assignment, the paper that is produced here, who drew that, Mr. Sampliner?

A. Yes, sir.

Q. Who presented it to you for signature?

A. Mr. Mandelbaum and I walked over to Mr. Sampliner's office and signed it there.

Q. Did you take the seal with you?

A. Yes, sir.

Q. Who suggested you should do that?

A. Mr. Sampliner.

Q. When?

A. Must have been on the same day.

Q. I don't ask you what it must have been?

A. Well, I should say December 28th.

Q. Was that in the daytime or night?

A. The daytime.

Q. So you found time, in the course of your awfully busy period, on December 28th, between Christmas and New Years, to go down to the office of the Film Company and get its seal and go to the office of Mr. Sampliner?

A. In my lunch hour, yes, sir, between eleven and twelve.

Q. So you now recall it was about lunch hour?

A. Well, when we signed this paper.

218 Q. Yes—how far is the Burrows Company from the Film Company?

A. Well, it is about a three minute walk at the most.

Q. Did carry the seal over to the Burrows office with you?

A. No, sir. I can walk from the Burrows Company's office to the Lake Shore office and to Mr. Sampliner's office in about five or ten minutes.

Q. Sampliner asked you to come, did he?

A. Yes, sir.

Q. Did he tell you that Mandelbaum was going to be there?

A. Yes, sir.

Q. And you met Mandelbaum at Sampliner's office?

A. I don't remember whether we met him there or walked over together.

Q. Had you ever seen the paper since, from that date to the present time?

A. No, sir.

Q. You didn't show it to any of the other lawyers, except your counsel, Mr. Schwartz?

A. I did not.

Q. And you signed it as soon as you saw it?

A. Signed it after reading it, that was the last——

Q. Have you told us the resolution in full that was passed at the anterior meeting, giving us the full purport of the resolution?

A. In assigning the claim to Mr. Sampliner?

Q. Yes?

A. Yes.

Q. Why didn't you put into the resolution the statement that he was to take care of any further litigation?

Mr. Rogers: I object to that.

The Court: I sustain the objection, you asked him why he didn't.

Mr. McCarter: He offered it, your Honor.

219 The Witness: I didn't draw the paper up.

The Court: Who drew up the paper?

The Witness: Mr. Sampliner drew the paper up.

Q. You misunderstand me, Mr. Sherman? You have testified here that you yourself introduced the resolution authorizing the assignment to Mr. Sampliner, and I am now asking not of the assignment itself, but of the resolution?

A. I offered the resolution to assign the claim.

Mr. Rogers: One moment.

The Court: He made a proper answer. I thought, before when I ruled, that you were talking about the assignment.

Q. Now, Mr. Sherman, you offered that resolution, didn't you?

A. I offered the resolution.

Q. And you have told us and have given us its full purport?

A. Yes, sir.

Q. Now, I ask you why you didn't include in that resolution a statement that Mr. Sampliner was not only to get this assignment for his services that he rendered, but was also to render further services.

Mr. Rogers: I object to that on the ground it is argumentative, and on the ground it is incompetent.

The Court: Overruled.

Mr. Rogers: And immaterial.

The Court: Overruled.

Mr. Rogers: I except.

The Court: You may answer. He wants to know, when

220 you offered that resolution, why you didn't include in the resolution a provision as to future services of Mr. Sampliner?

The Witness: I think that was included; I made the resolution that we assign the claim to J. H. Sampliner for services rendered and for protection in the future, as far as the trust was concerned.

Q. I thought that was in the resolution, but you had forgotten it, and you now recall it was in?

A. I may be mistaken at that.

Q. Have you been working for Mr. Mandelbaum at all since 1912?

A. Yes, sir.

Q. Are you reemployed by him now?

A. Yes, sir.

Q. In what capacity, Mr. Sherman?

A. Well, at present signing checks for him on two of his theatres.

Q. What?

A. On two of his different theatres, signing checks.

Q. Your duties with the Burrows Company don't prevent you from doing that yet, do they?

A. The boys bring the check books to the store and I sign them.

Q. What?

A. The managers bring the check books to the store and I sign them.

Q. Now you spoke of resignations; were the new officers elected the day you tendered your resignation?

A. We tendered our resignation in the Mutual——

Q. Won't you answer my question, were the new officers elected at the meeting at which you tendered your resignations?

A. I couldn't say; I tendered my resignation, it was accepted and I left.

221 Q. When did you tender your resignation?

A. In March.

Q. March of 1912?

A. March of 1912.

Q. Was that before or after this gentleman came and got the books?

A. That was just before.

Q. Just before?

A. I think it was just before.

Mr. McCarter: That is all.

The Court: Anything else? Let me ask you just this question.

By the Court:

Q. Up to this time had you ever heard of a claim of Mr. Sampliner for $5,000?

A. Why, Mr. Sampliner offered to settle his account against us for $5,000, provided we would pay him $5,000 cash.

Q. When was that?

A. That was in December of 1911.

Q. Was that before or after the resolution?

A. The resolution came afterwards.

Q. The resolution came afterwards?

A. Yes, sir. At the time that Mr. Sampliner made the statement to Mr. Mandelbaum, we had a meeting of the directors to see what action we could take, and at the same time Mr. Sampliner stated what it would cost us, what he figured it would cost, and also stated to Mr. Mandelbaum what we owed him.

Q. What did he say he figured it would cost?

A. About eight or ten thousand dollars to bring the suit.

Q. When you were talking about eight or ten thousand

222 dollars, you mean that would be the cost of bringing the suit?

A. That would be the cost of bringing the suit against the motion picture trust; then Mr. Mandelbaum ask- him how much we owned him, and when Mr. Mandelbaum reported—he also asked him if he wouldn't accept our claim against them for his account, but before that he stated he would take $5,000 cash, and we couldn't pay it.

Q. Then it was $5,000 cash to settle up for services rendered in connection with this so-called Motion Picture trust affair?
A. Yes, sir, if we settled in cash he would take $5,000.
Q. Now, in addition to that, you had been informed that it would cost about eight or ten thousand dollars to pursue the litigation?
A. To pursue the litigation against the Motion Picture trust.
Q. That was entirely outside of the $5,000?
A. Yes, sir, that was outside of the $5,000.
Q. And you didn't have the money for that?
A. No, sir, no money for engaging counsel to go after the trust or to pay Mr. Sampliner.
Q. And at that time you didn't know, in figures, how much your business had been hurt?
A. Well, we could figure——
Q. Answer my question?
A. No, I don't think we did, no, sir.
Q. And you didn't have eight or ten thousand dollars with which to pursue the litigation?
A. No, sir, we did not.
Q. And you didn't have $5,000 with which to pay for services rendered?
A. No, sir, we did not.

The Court: That is all.
Mr. Seabury: One question.

223 By Mr. Seabury:
Q. And in consideration of this assignment he was also to render, in the future, services if you had any trouble with the Motion Picture Trust, was he not?
A. Yes, sir.

Mr. McCarter: May I ask just one question.

By Mr. McCarter:
Q. You understand that this eight or ten thousand dollars that would be required to push the matter was to commence a lawsuit; you understood that, that it would cost eight to ten thousand dollars?
A. Cost eight or ten thousand dollars to take depositions around the country.
Q. In a law suit?
A. It would cost that to start a trial.
Q. And when Mr. Sampliner undertook to take the assignment, which you said you hadn't the money to pay the law suit expenses for, he was to pay those expenses and undertake all that work, was he not?

Mr. Rogers: I object to that on the ground it is immaterial and incompetent.
The Court: Overruled.
Mr. Rogers: I also object to the question on the ground that it is a collateral matter, and I submit that Mr. McCarter must treat this

witness as his own witness on that branch.

Overruled. Exception.

The Court: Instead of saying he was you can say, was Sampliner to pay those expenses.

224 The Witness: If he hadn't accepted our proposition and we engaged him, we would have had to pay, but having accepted our claim, that ended it as far as the Lake Shore Film Company was concerned in regard to paying; we had no claim then, we had nothing to do with the claim after that date—he was to pay all his own expenses, it was nothing to us.

Q. You couldn't have settled it without Sampliner's consent after that?

Mr. Rogers: I object to that as manifestly improper, he wouldn't have had anything to do with it.

The Witness: We had nothing to pay.

Mr. Rogers: Pardon me a moment.

The Court: Sustained, that is self evident.

Q. But these expenses, this eight or ten thousand dollars that was staring you in the face if that claim was to be prosecuted by you, Sampliner was to assume that and take care of it himself, is that right?

A. I don't get that question.

The Court: I think the matter is sufficiently covered, there is no use in pursuing it.

Mr. McCarter: That is all.

Recess.

225 Afternoon Session.

The Court: Now, gentlemen, we will continue with this case.

EMANUEL MANDELBAUM, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Rogers:

Q. If you do not hear me, Mr. Mandelbaum, you let me know and I will talk louder. Where do you reside?

A. Cleveland, Ohio.

Q. What is the street address?

A. 1387 East Boulevard.

Q. What is your present occupation?

A. I am general manager of the Stillman Theatre. The Stillman Theatre Company.

Q. Is that one of the companies that operates large theatres in the vicinity of Cleveland, Ohio?

A. It owns the building and leases and operates the theatre.

Q. And in the year 1908 were you connected with the Lake Shore Film Supply Company?

A. Yes, sir.
Q. Were you a stockholder in that company?
A. Yes, sir.
Q. It has been testified that the amount of capital stock was $10,000, consisting of 100 shares. How many of the 100 shares did you own personally?
A. Sixty-three or four shares.
Q. Were you an officer or a director of that company?
A. I didn't hear that.
Q. Did you hold an office in that company?
A. I hold the office as President and General Manager and also Treasurer.
226 Q. Were you a director of the company?
A. Yes, sir.
Q. Over what period of time were you a director, president and general manager?
A. I didn't get that.
Q. For how long had you been president and general manager and director of the company?
A. From the inception of this company until we sold to the Mutual Film Corporation.
Q. Prior to July, 1911, did your company have transactions with the defendant Motion Picture Patents Company and other defendants known as licensed manufacturers?
A. Yes.
Q. Will you state generally what those transactions were?

Mr. McCarter: It seems to me that is immaterial under the issues framed here.
The Court: I do not see what it has to do with it.
Mr. Rogers: As to the services performed by Mr. Sampliner.
The Court: Let him tell. It could be assumed for the purpose of the argument that he was entitled to the $5,000 claimed.

By the Court:

Q. Did Mr. Sampliner render a bill to the company for services rendered?
A. Yes, sir.
Q. From what period of time was it?
A. Beginning about July, 1910, and extending until, let us see, about a few months before we sold out to the Mutual.

By Mr. Rogers:

227 Q. Referring to the transaction with the Mutual as being about March, 1912, and taking that as the period of time, up to what time were the services of Mr. Sampliner performed?
A. Up to what time he performed services?
Q. Yes, with respect to March, 1912?
A. Until the claim was assigned to him—or any claim we had assigned to Mr. Sampliner, our rights that we may have in the

case—or we assigned him any rights we may have had in a claim against the Motion Picture Patents Company.

The Court: That is dated December 28th. Did he render services up to that time or had he ceased rendering them?

The Witness: Well, it was close up to that time.

Q. Are you the Mandelbaum whose signature appears at the foot of this paper, Plaintiff's Exhibit 1 for Identification?

A. It is my signature.

Q. At the time you signed this were you acting as president of the Lake Shore Film Supply Company?

A. I was.

Q. In the discharge of the duties of your office as president and general manager did you call into the employ of the Lake Shore Company, Mr. Sampliner and use his services as the attorney for that company prior to December 28th, 1911?

A. I did.

Q. Under his Honor's question will you kindly state to his Honor and jury what the services were you asked Mr. Sampliner to perform, without going into details? Just state generally what they were?

A. The first recollection I have of calling upon him was during the formation of the General Film Company, when I had
228 heard that they were to purchase or were purchasing some of the exchanges.

Q. What do you mean by the exchanges?

A. The exchanges that were then existing that had licenses from the Motion Picture Patents Company.

Q. Was the Lake Shore Company one of these companies?

A. It was intimated to me through——

Q. Wait a minute.

By the Court:

Q. Just explain the services that Mr. Sampliner rendered. You consulted him about such and such matters and he gave you advice, and things of that sort?

A. Yes, sir.

Mr. Rogers: May I have my question answered?

The Court: It will only delay matters.

Mr. Rogers: I asked whether his company was one of these.

Q. Was your company a rental exchange company?

A. It was.

Q. Now go on and describe.

A. I came on to New York about during July or August, 1910, to call upon the officers of the General Film Company in regards to selling the Lake Shore Film and Supply Company. I had consulted with Mr. Sampliner previous to my trip to New York, wanting to know really what I should do. I was seeking for advice both legal and otherwise because I felt that I was under pressure to sell

or that I would be and I was in great distress over things, and I wanted to have some advice in the matter.

Q. Before going to New York had you conferred with Mr. Sampliner?

A. Before I came to New York?

By Mr. Rogers:

Q. And in those conferences with Mr. Sampliner did you bring your papers and your documents to Mr. Sampliner's office for his inspection and examination?

A. I did.

Q. Now, without stating what advice Mr. Sampliner gave you did you receive some advice from him as to what you would do when you came to New York to see the representatives of the General Film Company?

A. I did.

Q. Then did you come to New York—then did you leave Cleveland and come to New York?

A. I did.

Q. Now when you came to New York did you see one of the defendants in this suit, Jeremiah J. Kennedy?

A. Yes.

Q. Did you have some transactions with him in regard to your corporation, the Lake Shore Company?

A. I did.

Q. Without going into details, will you say generally what they were?

Mr. Seabury: I think this is far afield from the issues here.

The Court: I do not think it makes any difference. I presume there will be no controversy that the services rendered were worth if you like $5,000.

Mr. Seabury: There is no way we can dispute that.

Mr. Rogers: I understood your Honor to say that if it became important in this case whether there were any services rendered by Mr. Sampliner that he would have to state what those services were.

The Court: Mr. Sampliner can probably give us the whole thing in five minutes. You have shown the services. It is only a question of value and Mr. Sampliner can put his value on them.

By the Court:

Q. You consulted with him a good many times and it was all about this motion picture business?

A. Yes, sir.

Q. And you advised with him as a lawyer, advising as to the Lake Shore Film Company in connection with what you regarded certain acts of the defendants?

A. Yes, sir.

Q. And that ran over how long a period?

A. Little over a year I should judge.

Q. Ending about when do you think?
A. Either probably October or November of the following year.
Q. That would be what year?
A. 1911.

The Court: That is all you need on that point. I will ask counsel for the defendant. You have no testimony to show that he did not render services?

Mr. Seabury: We have no testimony to show that he did not render services and not knowing we cannot say anything as to their value.

The Court: You have no testimony in contradiction of this?

Mr. Seabury: No testimony as to services rendered or as to the value of services, we know nothing about them.

Mr. Rogers: I offer in evidence Plaintiff's Exhibit 1 for identification.

231 The Court: I must exclude it for the present. Ask him what took place at the meeting?

Mr. Rogers: May I have an exception.

The Court: Certainly, that is one of the things you can always have in this court.

By Mr. Rogers:

Q. Mr. Mandelbaum, after these services had been rendered was the matter of the obligation of the Lake Shore Company to Mr. Mandelbaum taken up at a directors meeting of the Lake Shore Company—of Mr. Sampliner?

A. Put that question again.

By The Court:

Q. After these services were rendered was the matter of Mr. Sampliner's services and the obligation to pay for them taken up at a meeting of your board of directors?

A. Yes, sir.

Q. Now what happened?

A. To my recollection we had discussed the matter at more than one meeting.

By Mr. Rogers:

Q. As the result of something that transpired at one of the meetings were two men designated to go and see Mr. Sampliner?

A. There was a committee appointed at one of the meetings consisting of Mr. Schachtel and myself.

Q. Max Schachtel.

—. Yes, sir.

Q. Was he a director at that time?

A. Yes, sir.

Q. And were you a director in the company too?

A. Yes, sir.

Q. Did you go to see Sampliner?

A. Yes, sir.

232 Q. Did you have a talk with him?

A. Yes, sir.

Q. Kindly state generally what that conversation was?

A. We went to see Mr. Sampliner with the view of consulting him as to whether we had any right or whether we could recover from the Motion Picture Patents Company in our case. He told us he thought we could. I asked how much the cost of a suit of that kind would be and he told me it would be considerable. I think he said somewhere around $10,000. And, of course, the company was in such shape at that time——

Mr. Seabury: I move to strike that out as not part of the conversation.

Q. What did you say to Mr. Sampliner when he told you this?

A. I told him that the company could not afford to stand a law suit under that expense at that time; that they didn't have the funds. And we also consulted him as to the amount that we owed him at that time for services already rendered, and he told us it would be about $8,000, I believe, but he would take $5,000 in cash if we would settle it immediately.

Q. After he told you that what did you or Mr. Schaehtel or both of you do with reference to making a report of that to the directors of the Lake Shore Company?

The Court: Before you answer that. Have you exhausted the conversation with Mr. Sampliner. When he said he would take $5,000 did you say anything?

233 The Witness: That is what I was thinking about. I think I had told him then that I did not believe that the company could pay him because we didn't have the money and could not pay him at that time, and that we could not stand a suit; and I suggested to him whether some compromise, some settlement could not be made whereby we were to assign any rights to him that we may have in the claim against the Patents Company in consideration for what we owed him and he told me he thought he may consider that. He afterwards communicated with me or called on me in person and told me that he considered that he would accept that. And I called a special meeting for the purpose of putting it before the board and it—and it was settled accordingly on those basis.

By the Court:

Q. Mr. Sherman says he offered a resolution. Do you remember that?

A. Well, I do not recollect the procedure of the business, but I suppose it was done in the regular manner to my recollection.

Mr. Kingsley: I move to strike out "I suppose it was done in the regular manner."

The Court: Stricken out.

Mr. Rogers: An exception.

The Court: Do you remember what was said, not the exact words but the substance as to assigning a claim to him at the meeting of the Board of Directors. Do you understand the question?

A. Yes, I do, but I was trying to think. It was to the
234 effect that we assign our claim—any claim we might have against the Motion Picture Patents Company to Mr. Sampliner for services rendered to the Lake Shore Film and Supply Company and for which he would release us from any indebtedness to him. Something to that effect. I cannot remember the exact words.

Q. Was there anything about future services?
A. Yes, sir.
Q. What was there about that?
A. He was to defend us in anything that may come up in connection with the cancellation of our license by the Motion Picture Patents Company.
Q. Was there any talk as to whom the cause of action would belong after the assignment?
A. There wasn't any question about it; I presume it belonged to him as the purchaser.

Mr. Rogers: I didn't get the answer.
The Court: He says there wasn't any question about it, "I presume it belonged to him as the purchaser."
Mr. Rogers: I move to strike that out.
The Court: Well, you can strike out the words "as the purchaser."
Mr. Rogers: The law fixes the relation.
The Witness: Or after the assignment, I will correct that.

By Mr. Rogers:

Q. Now, Mr. Mandelbaum, was that resolution or vote put before the directors at the meeting?
A. Yes, sir.
Q. And what action did the directors take?

A. They voted in the affirmative.
235 Q. Anybody object to it at that meeting?
A. Not to my knowledge.
Q. You presided at that meeting?
A. Yes, sir.
Q. After the meeting was held did you go to Mr. Sampliner's office, and was a paper prepared there?
A. To the best of my knowledge Mr. Sampliner prepared a paper.
Q. And did you sign such a paper?
A. I signed such a paper, yes.
Q. I show you this paper, Exhibit No. 1 for identification and ask you whether that is the paper you signed after the board of directors had taken action to which you have testified.
A. I did, my signature.

Mr. Rogers: I now offer the paper in evidence.

Mr. Seabury: I make the same objection.

The Court: Overruled. I will take it now.

Mr. Seabury: I would like to add this, if I may, without arguing; that the primary purpose of suing on this appears from the fact that it is an action for treble damages and treble damages could only be secured by suit.

The Court: I understand your point.

Mr. Seabury: I just want to make the statement, and your Honor will allow us an exception.

The Court: Yes, I will take the paper now so as to complete the record.

Plaintiff's Exhibit 1 for identification received in evidence.

236 Mr. Rogers: May I have your Honor's permission to read it?

The Court: Yes.

Mr. Rogers: This paper is dated Cleveland, Ohio, December 28, 1911, and it reads as follows:

"For value received, The Lake Shore Film & Supply Company, a corporation organized and doing business in and under the laws of the State of Ohio, with its principal office at Cleveland, Ohio, hereby sells, assigns, and transfers to J. H. Sampliner, all of its rights and interests, in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in, and as a result of the unlawful agreement by and between The Motion Picture Patents Company, of New York City, The American Mutiscope & Biograph Company, The Edison Manufacturing Company, The Essanay Film Manufacturing Company, The Kalem Company, George Kleine, The Lubin Manufacturing Company, Pathe Freres, The Selig Polyscope Company, The Vitagraph Company, The Melies Manufacturing Company, and the General Film Company, all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore Film & Supply Company, and contrary to and in violation of the Sherman Anti-Trust Act, commonly known as the Sherman Law.

237 "In witness whereof, the said The Lake Shore Film & Supply Company, has caused these presents to be signed by its President, duly authorized thereunto, and has caused its corporate seal to be attached the day and year first above written.

"THE LAKE SHORE FILM & SUPPLY COMPANY,
By E. MANDELBAUM,
President.
W. A. SHERMAN,
Secretary."

Mr. Rogers: That is all.
The Court: Any questions?
Mr. McCarter: Yes, sir, a few questions.

Cross-examination.

By Mr. McCarter:

Q. Mr. Mandelbaum, you have spoken of the appointment of a committee—can you hear me?
A. Yes, sir.
Q. You have spoken of the appointment of a committee; had you and Sampliner discussed this question of your claim for damages against the Motion Patents Company before that committee was appointed?
A. We did at the office, yes.
Q. I beg your pardon?
A. We did at his office, when I went up to see him in reference to the suit against the Motion Picture Patents Company.
Q. And did he tell you that he believed you had a claim against the Motion Picture Patents Company?
A. I believe he did.
Q. So after he had told you of that, this meeting of the board took place and a committee was appointed to go and talk further with him about it, is that right?

238 Mr. Rogers: I object to that. I don't understand that to be his testimony.
Mr. McCarter: I am trying to find out.
The Court: Overruled.
Mr. Rogers: May I state my objection. I submit it isn't proper cross-examination for Mr. McCarter to state the situation different to the witness and then presume that that is cross-examination.
The Court: Overruled.
Mr. Rogers: I except.
The Court: He is old enough to take care of himself. What is the question?
(Question read by stenographer).
The Court: Do you understand the question?
The Witness: I am a little mixed up on this, judge; I would like to give it a little thought, I want to get clear in my mind about the committee business.

Q. We will have a recess until you can think about it.

Mr. McCarter: If your Honor wants to give it to him.
The Witness: I would like to get the question.
The Court: Perhaps if you put it in the interrogative it would be easier, Mr. McCarter.
Mr. McCarter: All right.

Q. I understand, Mr. Mandelbaum—speak so this gentleman can hear you now—that Mr. Sampliner had told you about this claim you had against the Motion Picture Patents Company and you went back and saw your fellow directors and appointed a committee to go and confer with him further about it, is that right?

A. I can't follow your questions. I would like to tell the story in my own way and then I won't get mixed up about it.

Q. Well, am I right in the idea?

A. I can't say. I can't answer that question. I would like to answer the question in my own way if you will permit me.

Q. Certainly, but I want to ask you a question to answer?

A. Yes, but don't ask so much at a time.

Q. You and Sampliner had talked about this matter of the claim against the Motion Picture Patents Company, hadn't you?

A. Yes, sir.

Q. He told you he thought there was such a claim?

A. Yes, after I asked him about it.

Q. And he told you he thought there was a claim?

A. Yes, sir.

Q. Then you called your board together, did you, and a committee was appointed to go on and take up the matter?

A. There was a committee appointed to find out, to consult with Mr Sampliner to find out whether we had a claim against the Motion Picture Patents Company, and whether it would be advisable to bring suit against them.

Q. And so this committee went to see him?

A. Yes, sir.

Q. And again he told you that he thought there was a claim?

A. That was only one time; that was only one time, there was no two committees.

Q. But I thought you stated a little while ago before the committee went to him at all, you and he talked about it, in which he said he thought there was a claim?

A. I made the statement, but I was mistaken.

Q. You were mistaken about it?

A. Yes, sir, I corrected myself.

Q. Now at that time, at the time this committee went to see him, he had rendered no bill against the Company, had he?

A. No, sir.

Q. And you didn't know what his bill was?

A. No, sir.

Q. When did you first learn what it was?

A. When the committee called on him, that is the time I learned the amount.

Q. And at that time he told you that he thought there was a claim, and he also told you that he had a claim against your company for how much money?

A. He said he would settle the claim for $7,000 in cash.

Q. $7,000 in cash?

A. Yes, sir.

Q. And he also said that if you didn't have the $5,000 in cash, if you would assign the claim to him, did he?
A. No, sir.
Q. Well, what more was said?

Mr. Rogers: I object to that.
The Witness: That is all my recollection.
Mr. Rogers: I object to the form of the question, "What more was said," implying that there was something said about it. I object to the form of the question, and I ask that he put a direct question.

The Court: Overruled.
Mr. Rogers: I except.

241 Q. That ended the interview when he told you his claim was $5,000?
A. There may have been other things said, as I stated before. As I stated before, whatever was said in my previous statement was correct.
Q. I am asking you what was said?
A. Then I will have to think what I said about it, because I am mixed up on it.
Q. What?
The Court: He says he will have to reflect what he said about it, because he is mixed up.

Q. What else occurred at this meeting when you and Mr. Schachtel went to see Mr. Sampliner, besides his telling you that he would settle his claim for $5,000?
A. I asked Mr. Sampliner whether it would be possible to arrange with him that by assigning our claim to him to anything that we may have, that he would cancel his bill against us, and he said he would consider it.
Q. Was the expense of the possible suit against the Patents Company spoken of?
A. Yes, sir.
Q. How much did he say that was?
A. Approximately $10,000.

Mr. Rogers: I object to that as incompetent, irrelevant and immaterial, preserving my objection and exception.
The Court: Overruled. Exception.

Q. Did you tell him you hadn't any such money as that in the treasury?
A. I told him we didn't think we had enough money, that the Company couldn't afford to prosecute the case.
242 Q. Did he then suggest that he would?
A. No, sir.
Q. He said he would reflect upon it?
A. Yes, sir.
Q. Did he report to you later?
A. He did.

Q. And at this later time he reported to you that if your company would assign to him this claim you had against the Patents Company, that he would release his bill, that he would bear the expense of the fight, and he would also take care of you in any further litigation arising out of the matter, did he not?

A. There was nothing said about the expense of fight. Simply the matter that we assign the claim to him and he would discharge his bill against us.

Q. And what about the future?

A. And also that he would render his services in the future, if there were any, without any charge, in connection with the case pertaining to the cancellation of our license.

Q. Who was to bear the expense of this claim?

Mr. Rogers: I object to that on the ground it is purely argumentative.

The Court: The question may be amended. Was anything said as to who was to bear the expense of the claim?

Mr. Rogers: Well, he has already said that there wasn't anything said.

The Court: Overruled.

Mr. Rogers: I except, and I also object on the ground that it is immaterial; if the plaintiff was the owner of the claim it didn't make a bit of difference.

The Court: Overruled.

Mr. Rogers: I except.

243 Q. Well, did you report back his conversation to your board, after he had reported to you?

A. I called a meeting after that.

Q. And you told the board that Mr. Sampliner was willing to receipt his claim against your company for legal services if the company would assign to him this claim?

A. Yes, sir.

Q. You further told the board, didn't you, that he stated that the expense of the claim, if the company sued it, would be some seven or eight thousand dollars?

Mr. Rogers: I object to that.

Q. Did you tell them that?

Mr. Rogers: I object on the ground it is incompetent, immaterial and irrelevant.

Overruled. Exception.

Q. Did you tell them that?

A. I told them that, no doubt, but I don't know whether I told them that at this meeting, or not—want to get it right.

Q. You told them at some meeting?

A. I told them at some meeting, yes.

Q. And did you recommend to the board the adoption of the idea that was finally formulated in the resolution?

A. I did.

Mr. Rogers: May I get my objection before the answer, on the ground it is incompetent, irrelevant and immaterial?
Overruled. Exception.

Q. And was it at this meeting when you made the recommendation that the resolution was passed?

244 Mr. Rogers: I make the same objection.
Same ruling. Exception.

A. What is the question, please?
Q. (Read.)
A. Yes.
Q. Was that a general or a special meeting?
A. Special meeting.
Q. And who prepared the resolution, you?

Mr. Rogers: First, I submit there should be some proof that there *a was* formal resolution prepared, and I submit it is wholly immaterial what form of resolution was made, and whether it was written or oral.
Mr. McCarter: Are you telling the witness or telling the court?
Mr. Rogers: I am making my objection.
Overruled. Exception.

Q. Did you prepare the resolution?
A. I have no knowledge.
Q. At any rate a resolution was passed, you distinctly remember, to this effect, that if Mr. Sampliner would receipt his bill against the company for about $5,000, the company would assign its claim against the Motion Picture Patents Company to him, and he was thereafter to defend the company in any future matters that might arise in connection with the relations of the company with the Motion Picture Patents Company; is that right?
A. I don't know. I couldn't answer that, that is too long a question.
Q. Too long a question?
A. Yes, sir.

Mr. McCarter: Will the stenographer read it?
245 The Witness: You put a lot of things in there that I wouldn't answer. You can ask a half a dozen questions on that very one and I will answer separately.

Q. Well, there was a resolution, wasn't there?
A. I don't know whether there was a resolution, whether it was in the form of a resolution or motion. I couldn't say that.
Q. Well, motion, if you will; there was a motion?
A. Yes, sir.
Q. And the effect of the motion was that if Mr. Sampliner would cancel his bill for about $5,000——
A. There was no amount mentioned.
Q. Cancel his bill against the Company, the company should assign to him its claim against the Motion Picture Patents Company

and Mr. Sampliner should thereafter defend the company in any suit or difficulty that might arise between him and the Company.

Mr. Rogers: I object to that, that is not a fair statement of the witness' direct testimony. His direct testimony was——

The Court: Never mind what its was. There was a motion made, wasn't there.

The Witness: Yes, sir.

Q. What was the motion?

The Court: You tell the motion in your own way.

Q. And speak so I can hear you now?

A. The motion was to the effect, substantially to the effect that the company assigned any rights that they may have against
246 the Motion Picture Patents Company to Mr. J. H. Sampliner for any claim that he had against the company for services rendered.

Q. How about in the future?

A. And he is to render any future services that might arise in connection with any action being brought against the Lake Shore Film Company by the Motion Picture Patents Company.

Q. How long before the paper, Exhibit No. 1 was signed, was this meeting held?

A. How long before it was signed?

Q. The paper seems to have been signed on December 28th, and you have talked about a meeting at which the resolution or motion was passed; how long a time expired between the meeting and the signing of the paper?

A. Not very long.

Q. As near as you can recall?

A. Well, a week or ten days possibly.

Q. Where was the paper signed?

A. My best recollection at Mr. Sampliner's office.

Q. How did you know to go there to sign it; did he send for you?

A. I don't recollect.

Q. What?

A. I don't recollect that.

Q. Who got Mr. Sherman to go?

A. I don't know.

Q. Who brought the seal there?

A. I couldn't say that.

Q. Did you take a receipt from Mr. Sampliner for his bill at the time that this document, Plaintiff's Exhibit 1 was signed?

A. No.

Mr. Rogers: I object to that as immaterial.

Overruled. Exception.

247 Q. The answer is no—why?

Mr. Rogers: I object to that as immaterial.

Overruled. Exception,

A. Because there was no bill rendered.

Q. I beg your pardon?

A. There had been no bill rendered, and I didn't think a receipt was necessary; Mr. Sampliner said he would not render any bill.

By the Court:

Q. At the time that you executed this paper to Mr. Sampliner had you made any calculations from figures as to what your damage was—meaning of course the Lake Shore Company's damage?

A. No.

Q. So when you made this assignment you didn't know exactly what the damage was in money, did you?

A. No.

Q. You hadn't made any effort to find that out accurately?

A. No, not at the time.

Q. Did you have any conversation as to whether your damage was $100,000 or $10,000 or any other sum?

A. That wasn't discussed, to my recollection, at all.

Q. Not discussed with anybody?

A. No.

Q. At that time did you have a complaint against anybody but the Motion Picture Patents Company?

Mr. Rogers: Might I suggest that the word "complaint" may perhaps be misunderstood.

Q. I don't mean the complaint that we speak of as a paper
248 in a law suit, I mean a grievance. Was there anybody else that you felt had wronged you?

A. When I say the Motion Picture Patents Company I mean the entire aggregation that was then connected with the Motion Picture Patents Company. The General Film Company and all the defendants connected with it.

Mr. Rogers: Could we have a stipulation that——

Mr. McCarter: One moment.

Mr. Rogers: I am trying to shorten the record. May we have a stipulation that these defendants were connected with the Motion Picture Patents Company and the General Film Company as officers or otherwise.

The Court: My question is not directed to that idea at all.

By Mr. McCarter:

Q. Now, again I am going to ask you to tell us what this resolution was that you say was passed?

Mr. Rogers: Your Honor, I submit that that question was put three or four times now by Mr. McCarter.

The Court: I think he has answered that general question, but if it is some specific question I will allow it. He has answered the general questions two or three times.

Q. Did you ever follow up to see how soon he commenced this suit?

A. I did not.

249 Mr. Rogers: I object to that as immaterial; the date of the summons shows the date of the suit.

The Court: He answered, he said he did not.

Q. You didn't have any interest after that?

A. No.

Q. Not the slightest?

A. No.

Q. After the assignment was made and delivered to Mr. Sampliner the interest of the Lake Shore Film & Supply Company and you as its manager and president, ceased that claim?

A. Yes, sir.

Q. Absolutely, is that right?

A. Yes, sir.

Q. And that was about December 28th, 1911, wasn't it?

A. Yes, sir.

Q. I show you a letter on the letterhead of the Lake Shore Film & Supply Company, dated Cleveland, January 31, 1913, purporting to be signed E. Mandelbaum; did you write that letter?

A. Yes, sir, that is my signature.

Mr. McCarter: I would like to have that marked for identification.

The Witness: May I read the letter?

(Letter handed to witness.)

Marked Defendant's Exhibit A for identification.

Q. Now, Mr. Mandelbaum, did Mr. Sampliner continue to act as attorney in this matter after you sold out to the Mutual?

A. No.

Mr. Rogers: I object to that on the ground it is indefinite.

250 The Court: Well, in regard to advising you as to your rights against the Motion Picture Company.

The Witness: His services ceased after we sold out.

Q. How long have you known Mr. Sampliner?

A. For a great many years. I can't say how many—before I went into the film business.

Q. Was he your selection as attorney for the Lake Shore Company?

A. Yes.

Q. And you came on from Cleveland with him a week ago tonight, didn't you, to New York?

A. I did.

Q. And have been here ever since?

A. Yes, sir.

Q. At his expense?

A. Yes, sir.

Q. Stopping up at the Astor at his expense?

A. Yes.
Q. You are quite a busy man, aren't you?
A. Very busy.
Q. Yet you have no interest in this suit?
A. No.
Q. When did you learn that this case was likely to be tried about this time?
A. Sir?
Q. When did you first learn that this case was likely to be tried about this time?
A. I can't answer that question.

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial. As I understand it, there isn't any issue about which this witness testified where the credibility is in issue.

The Court: Did you understand the question?

The Witness: I can't answer that; no.

251 Mr. Rogers: I would like to ask your Honor to limit the cross-examination, there isn't anything that he testified to under your Honor's ruling in which his credibility is in issue.

The Court: Overruled. He says he can't answer the question.

Mr. Rogers: I except.

Q. You took up the negotiations with the Mutual people which resulted in the selling of your stock and the stock of the other holders to those people, didn't you?

Mr. Rogers: I object to that as incompetent and immaterial.

The Court: How is that relevant?

Mr. McCarter: I want to show, your Honor, if he told them anything about Sampliner at that time, to defend the company against further trouble after he himself departed from the company and put other stockholders in his place.

The Court: I don't think it is material. You may have an exception to my ruling.

Mr. McCarter: I guess that is all.

Redirect examination.

By Mr. Rogers:

Q. Now, Mr. Mandelbaum, you said something about future services arising out of the cancellation of a license agreement by the Motion Picture Patents Company; was that one of the matters discussed with Mr. Sampliner at the time when you made the assignment?

A. It was.

252 Q. What were these future services or future actions that you talked about?

A. I don't get that question.

Q. What were these future services or future actions that you talked about?

Mr. Seabury: I object to that, I think he should give the conversation.

Mr. Rogers: That is what I am asking for.

The Court: Did you have any talk as to what the future services would be?

The Witness: Yes, sir, it would be in connection with any trouble arising out of the cancellation of our license.

Q. Was the cancellation of the license agreement that you talked with Mr. Sampliner about, with reference to a supply of films that was to come from the manufacturers, or did it relate to a claim by the manufacturers against you for the film that you had on hand?

A. It related to the film on hand, as I feared that there may be an attempt——

Mr. Seabury: I object to that and ask that what he feared may be stricken out.

The Court: Strike it out.

Mr. Rogers: I want to know what the future services were.

Q. Don't say you feared, say what you said to Mr. Sampliner about these future services that might be required?

A. The services required to defend the stock that we had then on hand, that we had bought through the Motion Picture Patents Company.

The Court: You mean the merchandise?

253 The Witness: The merchandise, the film—or if any replevin suit was brought against us to recover these films, that he would defend us without any cost.

Q. Now, was there something said at the conversation about royalties and your relations with the Motion Picture Patents Company regarding that?

A. Yes, that matter was also discussed, that in case they would force us to pay further royalties, that he would defend us in that matter as well.

Q. At that time had there been infringement suits threatened against your company and other rental exchanges throughout the country by the Patents Company?

A. Had there been infringements threatened?

Q. Were there infringement suits threatened at the time and pending against your company or other exchanges by the Patents Company?

The Court: Against your Company?

The Witness: Not against our Company, but there was against other rental exchanges that done business with the Patents Company and otherwise.

Q. And did you know at that time about the pendency of these suits?

A. I did.

Q. And was one of the things you discussed with Mr. Sampliner

the services that he was to render the Lake Shore Company in the event several infringement suits were begun against your Company?

A. Yes, sir.

Q. And what had Mr. Sampliner agreed to do for the Lake Shore Company in connection with these threatened suits or ex-

254 pected litigations against the Lake Shore Company?

A. He was to act as counsel in these cases for us without any charge, as I mentioned before.

Q. Was he to do anything more excepting act as your attorney in those cases?

A. That is all.

By Mr. McCarter:

Q. After you sold out, in March, 1912, to the Mutual Film, you continued as general manager of that enterprise run by the Mutual Film for how long?

Mr. Rogers: I object to that as immaterial.

The Court: I don't see that it makes any difference. I don't get the point.

Mr. McCarter: I want to see if he ever told his new bosses of this arrangement that he made?

The Court: Suppose you ask that question.

Mr. McCarter: I want to see if he was their manager.

The Court: I will allow it for that purpose.

Mr. Rogers: I except.

Q. How long did you remain as manager?

A. About a year afterwards.

Q. Did you ever tell them that just before you sold them your stock that you had assigned this claim that is now in suit for $750,000, to your lawyer for a claim of $5,000?

Mr. Rogers: Pardon me. First I object to the form of the question; I submit the form of the question is improper.

255 The Court: We can make it very short. Did you ever tell them about this claim?

Mr. Rogers: May I have my objection?

The Court: I sustained it, for brevity.

Mr. Rogers: I mean to your Honor's question, as incompetent, irrelevant and immaterial.

Overruled. Exception.

The Witness: I did not tell them. I didn't think it was of any importance at that time.

Q. Mr. Sampliner was an attorney at law of Ohio, was he not?

A. I believe so.

Q. He was a lawyer out there?

A. Yes, sir.

Q. And acted as your attorney?

Mr. Rogers: We will admit that he was an attorney and counsellor at law.

Q. What time of day was it, do you remember, when that meeting was held, when that assignment was given?

Mr. Rogers: I submit, your Honor, this is certainly not proper. I don't know what to call it, it certainly isn't cross-examination, and we have been over the redirect, and I submit that there ought to be a limit.

Overruled. Exception.

The Court: Do you remember what time of day it was?

The Witness: Well, I couldn't exactly remember that particular meeting, but we generally held our meetings in the evenings.

256 Q. You don't remember what time this meeting was held?
A. No.

By Mr. Rogers:

Q. Mr. Mandelbaum, when the Lake Shore Company was taken over by the Mutual Film Corporation, was there a change of officers in the corporation?
A. Yes, sir.
Q. Did you resign as president?
A. I did.
Q. Was there an entirely new set of officers elected?
A. There was no election to my knowledge.
Q. But in any event, you and all the old officers had resigned?
A. All the officers had resigned.
Q. You sold your stock in the Company?
A. Yes.
Q. And was the name of the Lake Shore Company changed?
A. Not till about a year afterwards, or more.
Q. Was it subsequently changed?
A. Subsequently, yes.
Q. And was it thereafter known as the Mutual Film Corporation?
A. How is that?
Q. Was it thereafter known as the Mutual Film Company?
A. Yes, afterwards.
Q. What became of the Mutual Film Company?

The Court: Who cares, I don't.

Mr. Rogers: I would like to show that the Mutual Film Company dissolved and went out of existence.

The Court: It has nothing to do with this case.

Mr. Seabury: That is not as I understand it at all, it is still in existence.

257 Mr. Rogers: I think they were inactive at the time.

Mr. Seabury: They changed the name of the Company to the Mutual Film of Ohio, and then assigned to a Company of the same name in Virginia.

The Court: It is utterly immaterial.

Mr. Rogers: Well, they produce the books themselves, your Honor.

Mr. McCarter: You said that a hundred times. We submit we

have produced that book, of course we produced it, why keep hammering at it?

Mr. Rogers: In the book they produced, at page 84, there is a notice of the meeting of stockholders for the purpose of dissolving the corporation.

The Court: What difference does it make, who cares, it has nothing to do with the case.

Mr. Rogers: Well, your Honor, so rules and I have my exception. I offer the proof and your Honor excludes it as being immaterial and I except.

The Court: All right.

Q. Did you have anything to do with the Mutual Film Company's business in connection with the Lake Shore Company, except that you were a paid employee of the Company?

A. I was also a director of the Mutual Film Company.

Q. Of Cleveland?

A. New York.

Q. I am talking about the Company that took over the Lake Shore Company; were you a director in that new Company?

A. Yes, sir.

278 Q. For how long?

A. About a year, I think, or more.

The Court: The point is simply this; you saw the people that took over the Lake Shore property, called the Mutual Film Company, in the course of a year more or less frequently, I suppose?

The Witness: Yes, sir.

The Court: And during that time you were their manager, were you?

The Witness: Yes, sir.

The Court: And in the course of that year, or whatever it was, that number of months, you never made any statement to them about this assignment?

The Witness: I did not.

The Court: That is all there is about it. Is there anything more?

Mr. Rogers: Mr. Sampliner take the stand, please.

JOSEPH H. SAMPLINER the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Rogers:

Q. Where do you reside, Mr. Sampliner?

A. Cleveland, Ohio.

Mr. Rogers: I am calling Mr. Sampliner under your Honor's rulings this morning, although my contention is that the burden is with the defendants, but I understand that your Honor rules that I must call Mr. Sampliner to prove the assignment.

The Court: You do not have to call him. The testimony as to services—they are shown. Whether you call further testimony is a matter entirely in your own discretion. All I ruled on was that I considered was necessary as part of the plaintiff's case. Now you may adduce that testimony from such sources as you are advised.

Mr. Rogers: May I reserve Mr. Sampliner, your Honor, until the defendant goes forward with some of its testimony?

The Court: It is all a matter of your discretion, Mr. Rogers. The defendant will be in a position to move for the direction of a verdict and the Court will have to pass upon it, so it is a matter for your judgment whether you want Mr. Sampliner's testimony or not.

Q. Now, Mr. Sampliner, are you an attorney at law in the State of Ohio?

A. I am.

Q. How many years have you been admitted as an attorney in that State?

A. About 27 to 28.

Q. You may state the courts in which you are admitted to practice?

A. All the State Courts of Ohio, the Common Pleas, the Court of Appeals and the Supreme Court of the State of Ohio.

Q. Is the Supreme Court the highest court of the State of Ohio?

A. The highest court in the State.

Q. Are you now, or have you ever been, an attorney of the State of New York?

A. No, I never have.

Q. Have you ever been admitted to practice in any of the Courts of the State of New York?

A. I have not.

Q. The Lake Shore Film and Supply Company of Cleveland, Ohio, it has been testified, was your client?

A. They were.

Q. Is that an Ohio corporation?

A. That is an Ohio Corporation.

Q. Incorporated under the laws of that State?

A. Under the laws of the State of Ohio, yes, sir.

Q. Do you recall approximately when the Lake Shore Company became your client?

A. Why, not very long after it was incorporated. They were doing business, that is the members of the corporation were doing business as a partnership prior to the time of their incorporation.

Q. About when was that?

A. That was prior to the month of July, 1908.

Q. Did this corporation continue to be your client until about the month of July, 1910?

A. I began doing business for the corporation shortly after its incorporation sometime in July, 1908. I think the first business was probably a short time after their incorporation as far as I can recollect.

Q. In and about the month of July, 1910, was there a situation concerning the Lake Shore Company in which your services were asked and obtained?

A. There was.

Q. Will you state generally what the services were that you were called upon to perform?

A. Mr. Mandelbaum, the president of the Lake Shore Film and Supply Company, called upon me and consulted me and wished advice from me regarding certain negotiations that might lead up to the purchase of the assets of the Lake Shore Film and
261 Supply Company by the General Film Company, and at that time he gave me a resume, a history of the situation, the method of doing business, in regard to being a licensed rental exchange, and when the agreement was first entered into between him and the Motion Picture Patents Company and perhaps eight or nine or ten of the licensed manufacturers, and consulted me at that time in relation to what rights they might have or what could be done if a sale of the assets was consummated.

Q. Now, in connection with the situation which was presented to you, was it necessary for you to make an examination of the law in order to define to Mr. Mandelbaum the legal position in which the Lake Shore Company was with respect to the transaction you have described?

A. I remember now distinctly that after the first interview Mr. Mandelbaum sent to me the copy of the license exchange agreement that had been entered into by and between the Lake Shore Film and Supply Company and the Motion Picture Patents Company and also sent over to me to my office the various bulletins and notices of cancellation of licenses of the various rental exchanges and exhibitors throughout the United States, and I examined all these matters carefully and looked into the question of law so as to be able to inform him whether or not he could legally dispose of the business of the Lake Shore Company.

Q. May I have your Honor's permission, in order to shorten the examination——

Mr. Seabury: Hasn't he gotten in enough about services?

262 The Court: You have the bill of particulars there?

Mr. Rogers: A very crude copy.

The Court: With the consent of the other side for the purpose of brevity offer the bill of particulars and let Mr. Sampliner say that that is a true statement of the services rendered.

Mr. Seabury: That is a very sweeping bill.

The Court: I don't think it makes any difference. I think that is the short way.

Mr. Rogers: I should like to have probably a little bit more in detail in cold type.

The Court: Mr. Rogers, let me suggest to you that there is only a question of law in this case and therefore that the record will show the services rendered. There is only a question of law. If at any time in the course of the trial I regard the services and their charac-

ter of any importance I will give you an opportunity to recall Mr. Sampliner to describe them in detail. At the present time I am disposed to think that the jury will not be concerned with examining into the detail of the services rendered. Therefore, I suggest that you offer the bill of particulars and Mr. Sampliner may state that it is a true and correct bill.

Mr. Seabury: There is no objection to that.

Mr. Rogers: I offer in evidence under his Honor's suggestion and as I understand the consent of the defendant——

283 Mr. Seabury: Reserving the right to cross-examine if it becomes necessary throughout the case.

The Court: Certainly.

Mr. Rogers: The bill of particulars verified by the plaintiff on or about May 23rd, 1917, the original of which is on file.

Q. Did you perform between July, 1910, and up to and including the end of December, 1911, services for the Lake Shore Film & supply Company as described in the bill of particulars now marked as evidence as Plaintiff's Exhibit 5?

A. I did.

Q. And did you spend on those services the approximate number of hours set forth in that bill of particulars?

A. I did.

Q. After you had performed those services?

The Court: The Clerk will mark the original bill of particulars as evidence.

Q. After these services were performed and before this paper Plaintiff's Exhibit 1—had the services been paid for?

A. They had not.

Q. Are you familiar with the emoluments and compensation received and paid to attorneys in Ohio during the years 1910 and 1911?

A. I am.

Q. What in your opinion would have been the fair and reasonable value of the services you rendered to the Lake Shore Company between the dates mentioned in the bill of particulars, Plaintiff's Exhibit 5?

A. From $8,000 to $10,000.

284 Q. Now in the month of December, 1911, or thereabouts did you have a conversation with Mr. Sampliner—with Mr. Mandelbaum, I mean, or Mr. Schachtel or both of them regarding the services you had rendered to the Lake Shore Company and your claim for payment?

A. I had a conversation both with Mandelbaum and Schachtel; they both came to my office together.

Q. Will you state what was said at that interview fixing as near as you can the time?

A. I think the first interview I had in relation to that subject matter was about the 10th of December, 1911.

Q. The first of November?

A. The 10th of December, 1911.

Q. Will you kindly state what was said at that interview?

A. Well, Mr. Mandelbaum did the talking, most of the talking on behalf of the two that came to see me and wanted to know whether I would be willing or could bring a suit against the Motion Picture Patents Company and the other ten subsidiary companies, the so-called licensed manufacturers of films for the purpose of recovering any damages that they had sustained by reason of the heavy loss in their business so far as profit and business in general was concerned. You want to know what I said to them?

Q. Yes, tell us what transpired?

A. Well, I told him I would bring a suit of that kind if they wished me to; that I had looked into the matter before and was satisfied that they had a valid claim for damages against this combination, and Mandelbaum then said, "Well, what will a suit of that kind cost us?" Well, I told him that in view of the fact that many of the exhibitors and rental exchanges were situated in
265 different parts of the United States and perhaps as many as a hundred different exhibitors had been injured in their business, their licenses abruptly cancelled and put out of business, and that it would require the taking of the deposition of these people at the places where they resided or where their business was located, and that the cost of a suit of that kind in connection with the fees that would be created or the compensation for my work so far as I could then judge would be in the neighborhood of $8,000 or $10,000. And Mr. Mandelbaum said "we haven't got the money, our business has been very poor and we have been losing money. We have been meeting here recently to attempt to finance the company. We owe for borrowed money and it is absolutely impossible for us to undertake any litigation of that kind." He also stated at the same time that by reason of the unfair competition that the General Film Company had given them after they had bought out the United Film Company of Cleveland who at that time were competitors of the Lake Shore Film Company, the damages that the General Film Company has done to the Lake Shore Film Company that they had been losing money and that they had lost very heavily and that is the reason that they were unable to get along without borrowing money. He at the same time asked me, "Well, what do we owe you for the work that you have done" and I told him that my bill was in the neighborhood of $9,000 or $10,000. Well, he says, "we cannot pay it, we haven't got the money." It was then that I said to him "if you will pay me $5,000 in cash I will cancel my indebtedness that I have against you."

266 Q. You have stated that you were willing to take $5,000 in cash. What if anything did Mr. Mandelbaum or Mr. Schaetel or either or both of them say to you?

A. They cannot pay it, they haven't got the money, they are hard up.

The Court: What was then said?

The Witness: Mr. Mandelbaum without answering me after I had made that statement thought for a few moments and finally said

that the corporation will transfer all rights that it has against the Motion Picture Company and the other companies, the licensed manufacturers, and the General Film Company and he asked whether I would be willing to take that assignment of them for and accept it as a transfer for the indebtedness that they owed me. I told him that I would have to consider the matter before giving him an answer.

Q. Then did the interview terminate?

A. The interview practically terminated. I said that I would give him an answer and think the matter over?

Q. Did you have a subsequent interview with him regarding this matter?

A. I did. I think two or three days after that interview, may be four days.

Q. State what transpired on the second interview?

A. I went over to the office of the Lake Shore Film and Supply Company and finding out that Mr. Mandelbaum was in his office I told Mr. Mandelbaum that I was willing to cancel my obliga-
267 tion under the circumstances against the Lake Shore Film Company for a transfer of their claim and any rights they have against the Motion Picture combination.

Q. Something has been said here about some services you were to render as an attorney in the future in litigation in which the Lake Shore Company might be a defendant. Will you kindly state just what the conversation was in respect to that?

Mr. McCarter: We have that in the bill of particulars.

The Court: He may state what was said.

A. My best recollection now is that after I had that interview with Mr. Mandelbaum at his office in which I stated to him that I was willing to accept an assignment of their claim and he then said that the matter would be considered at the meeting of the Board of Directors, and it was after as he told me that the board had considered it and advised him and Mr. Sheehan to see me in relation to the matter that they requested and wanted to know whether if they were to assign whether I would defend the Lake Shore Supply Company or either of the individuals or officers of the Company at the time in case any suit was brought against them in matters growing out of these so-called motion picture combination suits or unfair competition, either by way of replevin action or perhaps where there was an injunction granted preventing some of the exhibitors with whom the Lake Shore Film Company were then dealing in renting and leasing films of the then independent manufac-
268 turers—if a suit was brought enjoining the exhibitors from the use of the films which the Lake Shore Film Company had on hand after the cancellation of the license period and also in case any replevin action was brought whether or not I would defend as against those as a part of the consideration. And I said that I would.

Q. Were these so-called replevin actions or injunction proceedings any part of the so-called claim for damages?

A. No, sir, none at all. They had not arisen; there hadn't been any replevin action.

Q. Did that relate purely to actions in the event the Lake Shore Company was made a party defendant?

A. Entirely.

Q. What were you to do as to the defense of any of the threatened litigation that you have described?

A. If any action was brought I was to defend that action; give my services without any charge for the services.

Q. Were you to do anything beyond that?

A. Not a thing.

Q. Now in the discussion that you had with Mr. Mandelbaum was the likelihood that such suits might be brought against the Lake Shore Company discussed?

A. It was.

Q. Please state what was said?

A. Why, he stated that the manufacturers of film, some of them, had gone into a rental exchange operated by a man by the name of Schwab, and I think as many as 15 replevin suits had been brought against him and cleaned him out.

Mr. Seabury: I object to that. It has nothing to do with this case.

269 The Court: Strike it out.

Mr. Rogers: He has stated what this man said to him.

The Court: The only relevant point is that they had a conversation in which he said he would defend replevin or injunction proceedings against them.

Mr. Seabury: We have no objection to that, but when he undertakes to describe acts as to other concerns we object.

The Court: The objection is sustained. Strike out the last part of the answer.

Q. His Honor does not want you to state what they said in regard to any other exchange.

The Court: The point was you agreed to defend any replevin or injunction proceedings that might be brought against them: that is to put it in a nut shell.

The Witness: It is, your Honor.

By the Court:

Q. And that you were ready to give them your professional services in the event that they should need them in the defense of their rights in their merchandise?

A. Yes, sir.

Q. Now at the time that you had this conversation which ultimately resulted in the paper called the assignment, Plaintiff's Exhibit 1, did you know how much in money their claim amounted to?

A. The claim against the Motion Picture Patents Company?

Q. Yes, and the other defendants?

A. No, I do not. It was possibly discussed in a general way

as to the loss that had occurred by reason of the various
270 transactions and what had transpired——

Mr. Seabury: I have to strike out the latte- part of that answer.
The Court: I will let it stand. The point I am getting at is was there anything said which enabled you to know with any degree of accuracy how much money in damages the plaintiff at that time claimed, the Lake Shore, at that time claimed; and general discussion, not as to wrongful acts, but as to money, dollars and cents?
A. I don't think there was anything said as to any specific amount. I have a vague recollection——
Mr. Seabury: I object to his vague impressions.
The Court: I will let him complete his answer.
The Witness: I have a vague recollection that I had discussed with Mr. Mandelbaum or with Mr. Sherman, the secretary of the company, as to the losses in their business, so far as profits were concerned. I didn't go into it in detail because——
The Court: Strike out the answer.

Q. Up to that time had anybody gone through the books so far as you know of the Lake Shore Film Company or other sources of information at the disposal of the Lake Shore Company to ascertain what the losses if any there were?
A. No, sir.
Q. Now, when was it that you discovered that the damage was $250,000?
271 A. Some time after the claim was assigned I had Mr. Sherman—I requested Mr. Sherman to ascertain by accurate computation the profits of the business before the cancellation of the licenses and also the profits in their business, if any, after the cancellation of the licenses, and Mr. Sherman, after my request for those figures, brought me a balance sheet I think and said he had had an assistant to go over the figures with him. He brought it to my office. Those figures were in pen and ink.
Q. When would you say that was furnished?
A. I am not positive. My impression is it was four or five months after the claim was assigned. I did not intend to bring any suit to start with when the matter was assigned to me.

The Court: Strike that out.

Q. Four or five months?
A. That is my recollection.
Q. Was it some time after the 28th of December, 1911?
A. Yes, your Honor, it was some time after that.
Q. Did this balance sheet disclose damages of $250,000?
A. No, sir, it did not.
Q. Did it disclose some other figure?
A. It disclosed other figures.

Mr. Rogers: May I have an objection to this, your Honor?
The Court: Yes, you may, and an exception.
The Witness: In the bringing of the suit in this jurisdiction the

element of the value of the good will of the Lake Shore Film corporation was taken into consideration.

272 Q. In other words, when this complaint was drafted, there was added a certain amount to the ad damnum clause in addition to what had been disclosed by Sherman's balance sheet?

A. I think also at this time, if my counsel permits——

Q. Won't you answer my question? Is that correct?

A. I thought I had.

Q. Am I correct in understanding that after Sherman had shown you the balance sheet, but prior to the filing of the complaint in this action, you added to the amount of damages prayed for an amount in addition to what Sherman's balance sheet showed?

A. I did.

Q. Did you add a particular amount or how is that?

A. I think a particular amount was added.

Q. So that the complaint in this action when it prays for $250,000 prays for an amount in addition to the amount made known to you by Sherman through the balance sheet you have spoken of?

Same objection, ruling and exception.

Q. Is that correct?

A. As I have stated before, while there was nothing said ——

Mr. Rogers. One of the points of my objection was that his Honor's question assumed that Mr. Sherman's balance sheet was complete.

The Court: You misapprehended the question.

Q. On the 28th of December, 1911, you did not know what the damages *was?*

A. No, sir.

Q. And it was a pure matter of speculation then, wasn't it?

A. As to the exact amount.

273 Same objection, ruling and exception.

Q. All that you know at the time from your point of view as a lawyer was that the defendants may have damaged the plaintiff, the Lake Shore Company?

A. No, I wouldn't say that. I knew that the Lake Shore Company and Supply Company had been damaged. I had discussed that matter with the officers of the company, especially Mr. Mandelbaum, and I knew they had been damaged severely, but I did not know the exact figure.

Q. Did you know they had been damaged by these defendants?

A. Yes, sir, I did.

Q. Now, then, at some later period which your recollection indicates to you was some three or four months after, you asked Mr. Sherman to prepare balance sheets for you?

A. Yes, sir.

Q. And he did prepare such a balance sheet?

A. He did.

Mr. Rogers: I assume all this is subject to my same objection?
The Court: Yes: it is.
Mr. Rogers: And may I add to the objection now that your Honor's inquiries are addressed to what took place subsequent to the assignment of the cause of action?
The Court: The objection is overruled.
Mr. Rogers: An exception.

Q. Now then at some time subsequent to the presentation to you of this balance sheet by Sherman you concluded that the damage suffered by the plaintiff was in addition to such an amount as
274 was shown by the balance sheet, is that correct?
A. My recollection is that the balance sheet was——

Mr. Seabury: I move to strike that out.
The Court: He may answer.
The Witness: The balance sheet showed films rented during the year, the cost of film in other words. It also showed moneys received for the rental of the films during the year. It showed the gross profit. It showed the general expense of the business during the year, and in the subsequent year. And by a comparison of these two statements it showed a loss. Also when the license was cancelled I learned before the claim was assigned at the time when I discussed the matter with them that they had on hand a large amount of films which they were unable to use and which if they were used the user's license would be cancelled, and they were unable to use the films which they had the right to use for seven months after that license was cancelled, and that didn't show on that statement, if your Honor please.

Q. You still haven't answered my question. Get your mind on that balance sheet. When you made up the ad damnum clause in this complaint was some amount added to what was shown in the balance sheet?
A. I think the matter of the good will—I was in doubt in my mind at first as to whether any recovery could be had for the loss of good will.
Q. How much did you add for the good will?

275 Mr. Rogers: May I have the same objection and exception?
The Court: Yes.

A. I think the good will and the depreciation and other items show in the neighborhood of $100,000.
Q. And the remaining $150,000 approximately was for injury to the property of the Lake Shore Company of which you were advised by Sherman's balance sheet?

Mr. Rogers: Wait a moment?
The Court: You may have an objection.
Mr. Rogers: And an exception.
The Witness: There were other items that entered into matter of damages.

Q. Is it shown on the balance sheet?

A. The balance sheet simply had shown the business done the year before the cancellation and the year after, and the loss.

Mr. Rogers: I think a copy of that balance sheet is annexed to the bill of particulars.

The Court: I understand that perfectly.

Q. Now, when was this suit brought with reference to the government decree against the motion pictures, before or after?

A. This suit in this Court was brought after the decree in the government case.

Q. In other words it was brought after the United States Court in Pennsylvania had decided against the Motion Picture Patents
276 and others in an equity suit brought by the United States under the Sherman Law?

A. That was not my——

Q. I just want to know when it was brought?

A. The suit in this jurisdiction against these defendants was brought after that decree.

Mr. Rogers: I was going to offer this decree and make it a part of the record.

The Court: I know the decree.

Mr. Rogers: May I have a copy of the decree in?

The Court: No, you may offer in evidence the exact date if you want to.

Mr. Rogers: I think we can agree on it. The 125th paragraph of the decree——

Mr. Seabury: I object to all dates in reference to that decree.

Mr. Rogers: The decree was entered the 24th day of January, 1916.

The Court: When was the decision?

Mr. Rogers: October 1st, 1915.

The Court: When was this suit brought?

Mr. Rogers: January, 1917.

The Court: So the suit was brought after the decree?

Mr. Rogers: Yes, sir.

The Court: Then we are all agreed that the suit was brought after the Court's decree in the government case?

Mr. Seabury: And we have no objection to the date when the government's petition was filed.

Mr. Rogers: Let them offer it if they want it.

The Court: There is only one more question.

277 Q. On the 28th of December, 1911, could you say from the information at hand whether the damages to the Lake Shore Company was $5,000 or $250,000 or anywhere in between?

A. From the information that I had at that time, the discussions I had with Mr. Mandelbaum and the business that they had been doing and the loss of business that they had entailed, I had considered that they had damages to the extent of at least $75,000 at that time.

Q. So that you thought that this law suit would bring forth at least $75,000?

A. No, I did not consider a law suit at the time.

Q. You thought that this claim was a claim for $75,000 at least?

A. I thought that the Lake Shore Film and Supply Company had been damaged to that extent at least.

Q. And were you of the opinion at that time as an attorney who had been consulted in respect of these various transactions that if the law suit was brought there would be a recovery of at least $75,000?

Mr. Rogers: I object to the form of the question and further upon the ground that it has not been developed that when he got the assignment it was for the purpose of commencing an action.

Objection overruled. Exception.

Q. (Last question read.)

A. I could not tell you. I didn't know whether there would or not.

Q. No. I say, were you of the opinion from such information as you had that if a law suit were brought that at least the sum of $75,000 could be recovered against the various persons
278 who had wronged the Lake Shore Company?

A. I was not of that opinion. I figured that the loss—that they were damaged to that extent, but whether I could recover that amount I did not know.

Q. So you were not certain as to whether you could recover?

A. No, it was as to the amount that I was not certain.

Q. You were not certain as to the amount of money that could be recovered?

A. I know as a lawyer that a matter of damages is a matter for a jury to determine, and I was not sure what amount a jury might return.

Q. In other words, you knew as a lawyer that you could not possibly say what the recovery would be or possibly predict, could you, with any degree of certainty?

Mr. Rogers: May I have the same objection and exception?

The Court: Certainly.

A. I knew as a lawyer, if your Honor please, that in any action of tort, for instance, a personal injury case where a party is injured, that the damage sustained depends upon the extent of the injury, and also at the pleasure of the jury, what they might do under those circumstances.

Q. My question was very simple. My question was whether you perfectly understood as a lawyer that anybody would be unable to predict what those damages would be?

Mr. Rogers: May I have the same objection and exception?

The Court: Certainly.

Q. I am answering your Honor.

279 Q. The answer is that is yes or no.

A. I could not tell any one definitely the amount that

would be recovered because that was a question as I said before, which depended upon the conclusion or decision of the jury.

Q. And of course on the 28th of December, not knowing accurately to what extent the Lake Shore Company had been damaged, you could not form any estimate, could you?

Same objection, ruling and exception.

A. I could not form any estimate as to the amount that would be recovered. I knew they were damaged to the extent of about $75,000, but what that recovery would be in a law suit if one was brought I did not know.

Q. Did you know at that time if a law suit was brought that money would have to be expended to take depositions all over the country?

Same objection, ruling and exception.

A. I knew that if a law suit were brought that it would entail an expense on my part.

Q. And that you would have to spend the money to take depositions?

A. That I would have to spend money to take depositions.

Q. Now from such study as you have made did you realize in 1911, December 28th, that the first thing you would have to prove against these defendants would be a violation of the Sherman Anti-Trust Law before you could recover damages?

Mr. Rogers: I would like to have your Honor ask the witness whether he knew of any proceedings by the Government at that time.

280 The Court: I will ask it in my own way.

Mr. Rogers: I will object to it as incompetent, irrelevant and immaterial and upon the further ground that I ask your Honor to take judicial notice that there was a suit pending at that time by the United States Government.

Mr. McCarter: No, you are mistaken.

Mr. Rogers: Yes, I will withdraw the latter part of the objection.

Q. If a suit was brought against these defendants did you as a lawyer know that the plaintiff in that suit would have to show a violation of the Sherman Anti-Trust Law before there could be any recovery for damages?

Same objection, ruling and exception.

A. When the suit was brought in the United States——

Q. I didn't ask you about that. On the 28th of December, 1911, when you took this assignment in evidence as Plaintiff's Exhibit No. 1, did you as a lawyer know that it would be incumbent upon any plaintiff to prove a violation of the Sherman Anti-Trust Law before there could be any recovery for damages?

A. I did.

Same objection, ruling and exception.

Q. Knowing that, did you also know that in order to get the evidence to establish that fact it would be necessary to take testimony of many witnesses throughout the country?

A. I did.

Same objection, ruling and exception.

281 Q. And did you realize at that time that to take such testimony would involve a very considerable expense?

Same objection, ruling and exception.

A. I knew this, that the expense of railroad fares and hotel bills and the taking of the depositions would be involved. So far as my fees are concerned——

Q. I am only talking of the disbursements?

A. Yes, I knew that.

Q. And did you know you would have to spend those disbursements out of your own pocket?

A. I did. I knew I was the only one who owned the claim and that I would have to do whatever was done.

Q. And you perfectly understood that the Lake Shore Company was not able to pay those expenses?

A. I knew that the Lake Shore Film and Supply Company had nothing further to do with the claim.

Q. But you had been told by them that they could not pay the expenses of such a law suit?

A. They told me when I discussed with them about bringing a suit and I had fixed the price of $8,000 or $10,000, which included the expenses of paying me as well as the others, they told me they could not pay it. I knew that they could not afford to do it.

Q. You knew that they were financially unable to prosecute this law suit?

A. After they mentioned that fact to me, yes, sir.

Q. And when you took this assignment you were fully informed of the necessity of you paying money out of your own pocket if any law suit was to be brought on this assigned cause of

282 action?

A. I want to say that I knew that I, being the owner of the claim, that there was nobody else that would pay it. I had to pay it. It was my claim, then.

Q. I am not referring in this question to any bill for services. I am referring to the expenditure of disbursements. You knew perfectly well that any disbursements would have to be paid by you?

Same objection, ruling and exception.

Q. In whatever shape you regard yourself, whether as the owner of the claim or what not, you knew perfectly well that the claim could never be enforced unless you paid out of your own pocket the disbursements necessary in taking the testimony to which reference has been had?

A. I knew this——

Q. You can answer that question. That is as simple as simple can be.

A. I intend to answer. I am not going to say anything but answer the question, but I wish to say that when that claim was assigned to me there was no doubt in my mind that I would be able without a law suit to settle that claim with these parties.

Mr. Seabury: I move to strike that out as not responsive to any question put.

The Court: Strike it out.

Mr. Rogers: I except.

The Witness: In connection with that——

Q. You have not answered my question. My question is that, assuming for the purpose of the question, that by this assignment you became the owner of the claim, you knew if a law suit was brought you would have to pay the disbursements?

A. I did, certainly.

283 Q. And that there was no one else in the world but yourself who would be called upon for that purpose?

A. I knew that.

By Mr. Rogers:

Q. Was there something you wanted to add?

The Court: He cannot tell what is in his mind. As a lawyer he knows that as well as we.

Q. Is there any explanation you desire to give in connection with the answers you gave his Honor?

A. I was asked in regard to the bringing of this suit and I wish to state that before this suit was brought I had instituted about a year and a half after this claim was assigned to me, I instituted against the General Film Company in the United States Court in Cleveland a suit, and I could not get service on any of the others. One year and seven months after this assignment to me I brought suit in Cleveland.

Q. With the General Film Company as sole defendant?

A. Yes, sir.

Q. You could not get service on the others?

A. No, sir, not in my jurisdiction.

By the Court:

Q. When did you first try to get service on any of the other defendants in the Ohio suit?

A. Service was got in August, 1913.

Q. August, 1913?

A. Yes, the complaint or petition was filed about the 20th day of July, 1913.

Q. Now were all these defendants non-residents?

A. All these defendants were non-residents.

284 The Court: So you couldn't get service until somebody appeared in the jurisdiction, upon whom services could be made?

The Witness: Yes.

The Court: Without going technically into whether the service was good or bad, when did you first start any suit against any of these defendants?

The Witness: July, 1913.

Q. Is that the case you referred to as having been brought in the Federal Court in Ohio?

A. Yes, sir.

Q. What district was it brought in?

A. Northern district of Ohio, Eastern division.

Q. Was there only one defendant in that suit?

A. That is all that there was.

Q. The General Film Company, the sole defendant?

A. General Film Company the sole defendant.

Q. Had you information at that time or since then as to whether or not the other defendants could be found or served in the jurisdiction of the Federal Court in Ohio?

A. I had obtained information that I could not obtain service on them, and it was only after information——

Mr. Seabury: I think all that ought to go out, pure hearsay.

The Witness: From the Secretary of State.

The Court: It doesn't make any difference.

Mr. Seabury: All right, I won't press it.

285 The Witness: And after inquiry of the Secretary of State, I learned that the General Film Company was the only one of the defendants that had an officer or manager within the state of Ohio and had complied with the corporation laws of the state that service could be gotten on it.

By the Court:

Q. Prior to the beginning of the suit, had you made a demand on any of the defendants?

A. I had not; I had known——

Q. No, no, had you requested any of the defends to pay anything?

Mr. Rogers: To this line of question, is it included in my general objection as incompetent, irrelevant and immaterial.

The Court: Yes.

A. Was there a question?

Q. Yes, had you requested any of the defendants to pay anything?

A. Before that suit was brought?

Q. Before the Ohio suit was brought?

A. I am not sure, but I think that I had some talk with some

one who was connected with one of these defendants in New York City.

Q. When was that?

A. Well, as I say, that is my best recollection, that I did before I brought this suit.

Q. Well, I say, when, can you fix the time?

A. No, I couldn't. I was down in New York City on other business as well.

Q. Can you name the person with whom you had the talk?

A. I don't remember—I thought it was a man by the
286 name of Pelzer, but I wouldn't be sure of that.

Mr. McCarter: Who?

The Witness: I thought it was a man by the name of Pelzer, but I wouldn't be positive.

The Court: You may continue.

By Mr. Rogers:

Q. You have been interrogated about the figure of eight or ten thousand dollars which you stated to Mr. Mandelbaum was the approximate cost in the event you were retained by the Lake Shore Company to institute an action for damages?

A. Yes.

Q. Did that eight or ten thousand dollars include a prospective fee for your services in the matter?

A. It certainly did.

Q. And were you at that time expressing an opinion as to what you thought what the approximate cost would be to them, for your fees and the disbursements?

A. Why, I just gave an off-hand opinion, that is all; I couldn't determine definitely what it would be.

Q. You were not undertaking——

A. I took into consideration the class or character of the litigation.

Q. You were not undertaking to say what some other attorney might charge for his services in the matter?

A. No; I did not.

Q. Now, his Honor has asked you whether or not you considered or believed that in order for you to recover against these defendants under the assignment, that it would be essential or necessary for
287 you to begin an action under the Federal Anti-Trust statute; had you considered whether that was a common law action for conspiracy against these defendants as well as that of the Federal statute?

A. We have the Valentine Law in Ohio against restraint of trade, monopolies, and so on.

Q. And you considered that there were state statutes that also covered common law conspiracy?

A. I did.

Q. And that you considered that under the common law, when one or more persons combined for the purpose of causing injury

to another, that there is a common law action for conspiracy and a right for damages?
A. I did.

By the Court:

Q. Well, did you ever bring such an action?

Mr. Rogers: I object to that as being immaterial.

A. I brought an action in the United States Court.
Q. Well, what was the theory of the action in the Ohio district?
A. Would have been one for damages.
Q. Well, was it brought under the Sherman Law?
A. You mean the action that I brought in the Federal Court?
Q. Yes.
A. It was under the Sherman Law.
Q. What was the ad damnum?
A. I asked for damages for I think $101,000.
Q. In Ohio?
A. In Ohio—I had been debating in my mind whether the loss of good will could be taken into account.
Q. So in Ohio you asked for $101,000 which was the amount of damages, not the treble damages?
A. No.
Q. So the treble amount would be $303,000?
A. $303,000.

Mr. Rogers: Your Honor, I take it this is all taken subject to my objection and exception.
The Court: Yes.

Q. Before we leave that subject, would there have been any less necessity if you brought the action under some statute other than the Sherman Law, or brought it on some common law theory of getting the same kind of testimony that you would have to get under the Sherman Law?

Mr. Rogers: I object to that on the ground, if I may say so respectfully, that the witness could not undertake to answer that question; it depends on the nature of the suit he brought.
The Court: I am asking for his point of view; he can state his point of view.
Mr. Rogers: I except.

A. Kindly read that question.
Q. (Read.)
A. I knew I would have to have testimony of the parties that were injured; I don't know how many I would have had. I knew there were a great many people injured—I didn't expect at any time to take the testimony of all the people.

The Court: Now, Mr. Rogers——
Mr. Rogers: That is all.
The Court: You may ask, Mr. McCarter.

Mr. McCarter: I will be very short, I think, your Honor.

289 Cross-examination.

By Mr. McCarter:

Q. You talked about having considered the State Law, the so-called Valentine Law in Ohio, or other State statutes authorizing action; you didn't mention them in the assignment which you read, did you, Mr. Sampliner?

Mr. Rogers: I object to that as immaterial.

A. You mean in the instrument of assignment, that I stated?
Q. Exactly.

Overruled. Exception.

Q. Did you mean any such statute?
A. I didn't state in the——
Q. The assignment?
A. Just a moment, please—I didn't state it in the instrument of assignment, but in my——
Q. One moment, now. You are a lawyer and you know that if a person assigns something to you in writing, they are supposed, by the writing, to cover everything they assign; you know that as a lawyer?
A. Well, I don't know what you have referred to, everything they assigned—what do you mean?
Q. If a person assigns something to you in writing, the writing covers the whole thing, don't it? As a lawyer don't you know that, Mr. Sampliner?
A. Certainly, but I couldn't answer that question.
Q. You know that.
A. Let me answer the question, that although they assigned to me their damages that they had sustained by reason of the
290 violation of the Federal Anti-Trust Act, whatever damages they had sustained I could select whatever form I pleased, either in the Federal Court or in the State Court.
Q. You drew the assignment, didn't you?
A. I did.
Q. And you provided that you were to secure, and did secure by it, all of the right and interest in and to any and all damages which the Lake Shore Film & Supply Company has sustained and suffered by reason of injury to its business because of the unlawful combination and monopoly in restraint of interstate commerce and in violation of the Sherman Anti-Trust Act, brought about, engaged in, and as a result of the unlawful agreement, &c., all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore Film Company and contrary to and in violation of the Sherman Anti-Trust Act, commonly known as the Sherman law. That is the way you drew the paper?
A. I did.
Q. Do you say that at the time you had procured an assignment

for damages under any other Act than under the Sherman Anti-Trust Act?

Mr. Rogers: I submit that is a question of law and not for the witness to answer.

Overruled. Exception.

Q. Do you?

A. I say that under the assignment of that instrument the damages that they had sustained were by reason of the violation of the Federal Law.

Q. Very good; that is plain, isn't it?

A. Certainly, but I didn't——

Q. Well, now——

291 Mr. Rogers: Let him finish his answer.

The Court: No, he has answered and you may ask him on re-direct. He is asked a simple question and he has answered it.

Q. Now, as I understand you, you got Mr. Sherman to go over the books; did you pay Sherman for that?

A. I did not.

Q. Who was paying Sherman to go over the books and find the amount of the damages that you owed?

Mr. Rogers: I object to that as being perfectly immaterial, and on the ground it assumes some one else had paid him.

The Witness: I had rendered——

Mr. Rogers: One moment.

Overruled. Exception.

The Court: Was anybody paying Sherman?

The Witness: Mr. Sherman was not paid at all by anybody.

Q. Oh, just out of goodness for you he did that work?

A. He did that work for me at my request.

Q. And he reported to you a loss, as he said, of about $100,000, is that right?

A. I don't think that that paper shows a loss of $100,000.

Q. How much did it show?

A. It was a mere matter of calculation.

Q. How much did it show?

A. I am telling you, this is a matter of calculation as to the balance sheets of each year; that in estimating the damage, I took into consideration the losses that the Lake Shore had sustained by

292 reason, also, of the payment of the royalties of $2 per week of the machines that the exhibitors were requested to pay, or which the rental exchange paid—I took all those matters into consideration.

Q. I don't want a regular argument.

A. I am giving you the actual facts as I arrived at it.

Q. How much did it amount to?

A. $101,000.

Q. At that time?

A. Yes, sir.

Q. At the time that Sherman made the report to you?

A. At the time of the assignment to me of the cause of action.

Q. The report that Sherman gave you, gave damages, you say, amounting to $101,000?

A. Mr. Sherman gave me that report, I am telling you.

Q. That is what I am asking you.

A. I say that Mr. Sherman at my request, has made out a balance sheet showing the differences in the earning power of that company the year before the cancellation of the license and the year after, so as to show what the actual loss was, in dollars and cents as far as it could be computed; and also, he gave me the information and I had the information at the time of the transfer to me of the loss that they had sustained by reason of payment of royalties in place of the exhibitor. I also was told about the inability, by reason of the restrictions that the manufacturers placed upon these rental exchanges and exhibitors, so that they were all unable to use the films which cost a lot of money, which they had a right to use several months after. In that way I obtained a statement of what the damages, as I supposed, were.

293 Q. I am asking you what damages the statement that Mr. Sherman made, gave you?

A. Mr. Sherman did not give me a statement of damages; he gave me a statement of the earnings of the losses.

Q. And the earnings after deduction showed how much, by his statement?

A. My impression is, as I remember it now, I think about $50,000 or $60,000. I don't remember—I don't remember it, that is all—clearly.

Q. Now, you drew this bill of particulars that was filed in this case?

A. I swore to it, yes.

Q. You swore to it, didn't you?

A. I did.

Q. It was right?

A. As I say, I swore to the bill of particulars as set forth there based upon the figures that Mr. Sherman gave me.

Q. Now, I notice that by your answer to demand eleven, the profits that this concern made from January 1, 1910, to March 1, 1911, are as I understand it, $65,000, is that right?

A. That was before the cancellation of the license, as I understand it.

Q. Are you sure about that?

A. I am.

Mr. Rogers: Mr. Sampliner, after you and Mr. McCarter get through with this controversy I would like to make an objection.

May I have it noted, your Honor, I object to this line of testimony on the ground we are not trying the general damages here and this testimony is incompetent, irrelevant and immaterial.

Overruled. Exception.

294 Q. So that down to March, 1911, your assignment being dated in December of the same year, the balance sheet of this concern showed a profit in the preceding year of $65,000?

A. Let me see that again, will you?

Q. (Same handed to the witness.) Will you answer the question?

A. I see by this statement here, which is the copy of the balance sheet that Mr. Sherman gave me, that it is for the period from January, 1910, to March 1, 1911. The greater part of it——

Q. Will you answer my question?

A. I am. The greater part of that period is before there was any cancellation of the license.

Q. Well, at any rate——

A. Before they had even any competition with the General Film Company.

Q. You are not making any argument?

A. I am answering your question.

Q. They made a profit of $65,000 down to March, 1911, didn't they?

A. Yes, sir.

Q. So that any loss that you speak of came after March, 1911?

A. After March, 1911.

Q. Now, you waited a year and five months after you got your assignment and then you commenced a proceeding out in Ohio, didn't you?

A. I did.

Q. Now, look at this document and see if you recognize it as a copy of your complaint out there (showing witness paper)?

A. Yes, as I stated.

Q. For injury to the business of this Company by reason of the violation of the Sherman Act?

A. That is true.

Q. Commenced in the Federal Court?

A. Yes, sir.

295 Q. And you multiplied that $101,000 by 3 and said your total claim was $303,000?

A. By virtue of the Federal Trust Act, the treble damages are allowed.

Q. Exactly?

A. And I brought suit under the Act as the Act permitted.

Q. Now, down to that time, at least, you were satisfied that your total claim for loss to that company by reason of the Sherman Act was $10,000?

A. Yes, I said before——

Q. Answer my questions—"Yes"—I am trying to get through. I want to get away from here sometime. You filed an amended petition in that action?

A. I did.

Q. How soon after that first petition was filed?

Mr. Rogers: I object to that.

Overruled. Exception.

A. I am going to answer the question.

Q. How soon after you filed your original petition did you file an amended petition?

Mr. Rogers: Your Honor, I have been excluded from both counsel tables—may I at least have an opportunity to object—in any event may I make an objection?

The Court: Yes.

Mr. Rogers: I object to this generally upon the ground it is improper, immaterial and irrelevant; it evidently goes to the general damages in the case which we are not trying at this time, and I press my objection.

Overruled. Exception.

296 Q. The question is when you filed it?

A. I think it was late in the fall, probably later than that, of the year 1915.

Q. About how many months or years?

A. I couldn't tell you exactly how long.

Q. Six months?

A. I couldn't tell you for this reason, that I was absent from the country for some time, and upon the filing of a motion on the part of the defendant, they had filed a motion with thirty-one requests——

Mr. McCarter: I don't want all that, your Honor.

The Court: Yes, you must answer that question.

Q. How long a time, about?

A. After the Court had settled the matter of the motion, how long that took I don't know.

Q. About six months or a year?

A. I don't remember; I think it was probably six months maybe longer.

Q. Look at that petition and see if that is a copy of the amended petition (handing witness paper)?

A. I think it is.

Q. And you stated the damages exactly the same in that?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial, not the issue we are trying here.

Overruled. Exception.

Q. You stated them the same?

A. Exactly.

Q. You drew both complaints?

A. I did.

Q. You then had this claim in your ownership for a period of at least two years, hadn't you?

A. I think it would be close to that.

297 Q. You have been studying the matter?

A. Well, I had some work to do.

Q. And you then placed the damage at $101,000 in this amended complaint?

A. Yes, sir.

Q. What happened in the meantime, when you commenced this suit in January, 1917, in New York, under the Sherman Law, that enabled you to raise the damage from $101,000 to $250,000?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial; on the grounds already urged and on the further grounds that the items going to make up the $250,000 are set forth in the bill of particulars which are now on file in this court verified by the witness under date of April 6, 1913.

The Court: I will overrule the objection, and I will give you the reason why, which I thought I had outlined heretofore; all this line goes to determining whether this is a speculative cause of action. What men do is the index to their minds; what they say is not always an indication of what they think and it frequently is incapable of construction, but what they do is the basis upon which a judgment may be predicated. Now Mr. McCarter is simply pursuing, with a knowledge of the data, a line that I have already indicated in my own examination.

Objection overruled and the question will be answered.

Mr. Rogers: I respectfully except.

The Court: Read the question.

Q. (Read:) Commenced in New York?

A. Befor- this suit was begun in New York I had received from the government a great many of the exhibits that belonged
298 to the government, a great many receipts of the royalties paid by the Lake Shore Film & Supply Company of which I had no knowledge at the time I brought the suit in Cleveland, and it was apparent, after figuring the receipts and the royalties paid of which I did not have a good knowledge at the time I brought the suit in Cleveland, I found that the damages exceeded the amount as to that item.

Q. Is that the best explanation you can give?

A. Also that at the time I brought the suit, at the time I bought the claim, I was doubtful whether the loss of the good will of the business was a matter of damage.

Q. Did you mention good will in your lengthy complaint?

A. I think there is something said there in the bill of particulars.

Q. I asked you if you mentioned good will in the complaint?

A. I think so—I may be mistaken, I am not sure, it is very lengthy.

Q. Now you said you had a very vague recollection, weren't quite sure of having said something to Mr. Pelzer in New York. Will you swear that you ever spoke to Pelzer in New York concerning this claim of yours?

A. I know positively that I met Mr. Pelzer.

Q. Will you swear that you ever spoke to Pelzer in New York or anywhere else before this suit was commenced, or any suit was commenced, concerning the claim in your hands?

Mr. Rogers: I submit the witness has not testified that he talked to Pelzer; he said he doesn't recollect, that he wouldn't be sure.

The Court: He is asking him now whether he can swear to the fact; he said he had some vague recollection.

299 A. No, sir, I wouldn't undertake to swear to that fact.

Mr. Mearter: That is all.
The Court: Anything further, Mr. Rogers?

Redirect examination.

By Mr. Rogers:

Q. In connection with the bill of particulars on file in this court, sworn to by you on the 6th of April, 1917, the Clerk's file mark as of April 8, 1917, there is a statement of certain royalties at the rate of $2 per week made by the Lake Shore Company to the defendant, the Patents Company, or to the licensed manufacturers for their benefit; was that amount definitely known, the amount of the payment of these royalties?

A. At the time of bringing the suit in Cleveland?

Q. At the time when you took the assignment?

A. No, I did not know. I knew that there were payments of money of a large amount for royalties, but I had not means of estimating exactly the amount.

Q. But you know those payments had been made at the rate of $2 per week for projecting machines?

A. I knew that payments had been made at the rate of $2 a week for the use of each machine that any of their customers had.

Q. And you are familiar now with the decision of the United States Supreme Court recently announced in the case of Motion Picture Patents Company v. The Universal Film Manufacturing Company; without detailing at length what these royalties are about, are they generally the royalties referred to in the opinion of the United States Supreme Court?

300 The Court: That is utterly immaterial. The testimony is uncontradicted that at the time of this assignment the plaintiff in this action didn't know what the damagge was, and had no basis, of the character that a plaintiff must have when he brings his suit, even though the plaintiff had been the Lake Shore Company—that is to say, he must know what his damages are—by which I do not mean to be misunderstood as saying he could liquidate his damages in his own mind, but he must know the general tenor of his cause in respect to which he has been injured, and he must have some basis upon which to make his own judgment.

Mr. Rogers: Well, your Honor, he has already testified——
The Court: I understand his testimony.
Mr. Rogers: Well, unless I have entirely misconceived the purport of his testimony, I think he used the figure $75,000 and he said that he knew that at least that amount had been sustained in damages.
The Court: I am not going to spend any time on the case of the

Motion Picture Patents Company v. The Universal Film Manufacturing Company.

Mr. Rogers: Then, I will get at it in another way, your Honor.

Q. Had you known on December 28, 1911, that it had been the practice of these defendants to compel the Lake Shore Company to pay to these defendants the sum of $2 per week for each
301 projecting machine upon which the film distributed by the Lake Shore Film Company was used?

A. I had.

Q. Did you know at that time that the payment of this $2 per week was exacted upon projecting machines which had been owned outright by the persons who had purchased them before the organization of the Motion Picture Patents Company?

A. I had.

Q. Will you state generally what information you had regarding these $2 a week payments?

Mr. Seabury: I object to that as immaterial.

The Court: Sustained.

Mr. Rogers: I except.

Q. Did you consider, as an item of damage, on December 28, 1911, at the time of this assignment, that there had been paid a number of thousands of dollars to the defendants by the Lake Shore Company at the weekly rate of $2 per week for the film shown on projecting machines used by the exhibitors dealing with the Lake Shore Company?

A. I did.

Q. What were these $2 a week payments?

Mr. Seabury: I object to that as immaterial. He couldn't have known the United States Supreme Court was going to reverse Henry v. Dick several years later.

The Court: Sustained.

Mr. Rogers: I except.

Q. Was the amount of these so-called royalties of $2
302 per week payments contained in the books of the Lake Shore Company so that they could be definitely ascertained?

A. Yes, they could have been definitely ascertained.

Q. And were there receipts or acknowledgements among the papers of the Lake Shore Company from the defendant? The Patents Company acknowledging receipt of payments?

Mr. Seabury: I object to that.

A. A great many.

The Court: Sustained.

Mr. Rogers: I except.

Q. Annexed to the bill of particulars is a statement as to some of these payments under the heading of "Statement of some $2 per week payments for which the defendant the Motion Picture Patents

Company, issued its formal written receipts." I ask you to look at that paper and testify from memory, if you can, after refreshing your recollection, approximately what these amounts were?

Mr. Seabury: They appear in the bill of particulars and I think the bill of particulars is in evidence; if not, he can read from them.

The Court: Is this *is* the same thing that is in evidence?

Mr. Rogers: There are two bills of particulars.

The Court: Try and give the total.

Mr. Rogers: Well, the total isn't there. The statement is, "Some of the payments made."

The Court: I will allow you to introduce that in evidence. Let the Clerk mark it, for brevity.

Marked Plaintiff's Exhibit No. 6.

The Court: Is there anything else, Mr. Rogers?

Mr. Rogers: That is all.

303 The Court: Plaintiff rests?

Mr. Rogers: Plaintiff rests.

Mr. Seabury: On behalf of the defendant, I move for a direction of a verdict dismissing the complaint.

The Court: Defendant rests?

Mr. Seabury: Yes, sir, defendant rests.

Mr. Rogers: Plaintiff moves for a direction——

Mr. Seabury: In other words, to present this question, the defendant rests.

The Court: You move for the direction of a verdict?

Mr. Seabury: Yes.

The Court: The defendant rests and moves for the direction of a verdict. Now, will you state the grounds.

Mr. Seabury: I move for a direction of a verdict on the ground that the plaintiff has not shown title to this cause of action; on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void.

I think your Honor would ransack the books to find a clearer case of champerty——

The Court: I do not care to hear you on that.

Mr. Seabury: I think those two grounds cover it.

Mr. Rogers: Does your Honor care to hear argument?

The Court: No, I don't care to hear argument. I don't want to seem discourteous, but I have studied this case with great care; I took the brief of both sides, and I have given it careful consideration, as far as matters of law are concerned.

304 Mr. Rogers: Well, if your Honor finds against the plaintiff, then it must be a non-suit, it can't be a verdict.

The Court: The defendant rests.

Mr. Rogers: We are not trying the general issue.

Mr. Seabury: If we are willing to waive all our rights on all the other issues, how can they complain?

Mr. Rogers: I am getting down to the practice.

The Court: I am not disturbed about the practice.

Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.

The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

305 Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any "ifs." If you think under Section 973 of the Code, the Court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case.

Mr. Rogers: Then, your Honor, may I state my position on the record?

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule.

Mr. Rogers: Then I move for a direction, your Honor, for
306 the plaintiff, upon the issue framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void because

he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to . . . thereon.

I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors.

Having thus disposed of the facts, I proceed to express, briefly, I trust, my views of the law of the case.

The Sherman Anti-Trust Law was enacted by Congress with the fundamental purpose of redressing what Congress regarded as grievous wrongs visited upon persons by those combinations or monopolies which the statute denounced. It provided, broadly speaking, two kinds of remedies; one was a suit in equity at the instance of the government to dissolve unlawful combinations
307 and in that manner to destroy conspiracies directed against what Congress regarded as the appropriate conduct of the business of this country; the other remedy which was afforded was to give to the person injured in his business or his property an opportunity to recover damages for injury to his business or his property, and Congress provided that whatever the damage was which the jury might find, that damage would be trebled—the theory being that the injured person should be recompensed in a manner so exemplary that it would be a lesson to others.

Now, the courts have held that that provision does not provide for a penalty, but must be regarded as in the nature of damage compensation. It certainly never could have been the intent of Congress that so important a remedy having to do with the appropriate conduct of the business of the country should be the subject matter of bargain, sale and speculation at the hands of attorneys.

Judge Hough has held, and I am bound to follow his holding, in the Imperial Film case that such a cause of action is assignable. I must therefore start off with the assumption, that, as a matter of law, the cause of action could be assigned, and it is probably true that if the courts thus hold, it will be because that they feel that in a proper case a merchant or corporation which has been injured may assign of its cause of action as to be serviceable to its creditors, or perhaps to other persons. But I have a strong conviction that it will never be held in a Federal Court, either in the Court of original jurisdiction or an appellate court, that such a cause of action is merchandise to be availed of by an attorney.

308 I personally, and every gentleman in this case, on both sides, have a very deep regard for the profession to which we belong. It is a profession which insists that its purposes are noble and its practices are useful. It is the duty of the lawyer to render services, to advise, to assist and aid those whose life or liberty or

property is in one manner or another in peril. But the moment a lawyer steps down from that high place to be a speculator in law suits he is absolutely violating every tradition of the profession, and the courts have persistently frowned on that sort of thing.

The case is entirely different from where a lawyer for services rendered, takes an assignment of some thing in action clearly and unquestionably to recompense himself for such services.

Now, what is this case? In this case a lawyer, for services that he is willing to settle for $5,000, cash, takes an assignment of a claim which he himself thought was worth at least $75,000 and which, multiplied, makes over $200,000. He then proceeds, later, to bring a lawsuit in which he makes those damages $101,000 which, trebled, make $303,000; and then he comes into this jurisdiction with a claim of $750,000, which, trebled, makes $2,250,000—if that is not the rankest kind of speculation, I never heard of a case in my life that involved speculation.

More than that, little things in a lawsuit are of great service, and, in response to Mr. McCarter's final cross-examination, I noted that the plaintiff said, "The time I bought the claim"—that is unquestionably what he did; if he could get a settlement well and good; if he couldn't get a settlement then he could speculate upon what damages he could obtain. Now, these defendants, if they were guilty of wrongs, could have responded in lawsuit to the true plaintiffs; this plaintiff's attorneys would have had the right to say, "I will take this lawsuit for you on a contingency, dependent on recovery," and if he had done that he would not have violated the law in any respect, as I understand it—but he was ready to take this claim and pay money out of his own pocket, which is champertous in itself, for the disbursements necessary to prosecute this law suit to an end.

Now, both sides have presented many authorities; I do not think the case is one that requires much citation of authority, and I shall content myself with placing, as part of my opinion that I am now delivering orally upon this record, the significant words of a great judge, Chancellor Kent, in a case where perhaps the facts were a little different, but with the clarity and the firmness that characterized his judicial career. He puts the matter in language that any man may understand, and he said:

"The purchase was avowedly made as a matter of speculation, and at a time when this attorney knew from previous disclosures made to him in his character of attorney, all the facts on which the foundation of the claim so purchased rested, and which created a belief in his mind that the value of the wine could be recovered. Such a purchase, by such an officer, and under such circumstances, cannot be sustained. It is champerty, for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law, as by the statute"—

and he continued, and I am quoting from Arden v. Patterson, 5 Johnson's Chancery—

"The purchase of a lawsuit by an attorney, in a case like this, is

champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression and corruption. As a sworn minister of the courts of Justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character, to speculate in law suits. The precedent would tend to corrupt the profession and produce lasting mischief to the community."

Adopting these clear and unquestioned statements as the doctrine to which every lawyer and judge who loves his profession must subscribe, I grant the motion and direct a verdict for the defendants.

Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the question of fact, if any there be.

(Whereupon, as directed by the Court, the jury found a verdict in favor of the defendants.)

(Whereupon the jury was excused.)

Mr. Rogers: First, I except to the verdict being received from the jury, my contention being that the Court is limited merely to declaring a non-suit that the direction of a verdict in favor of the defendant is not authorized by the statute or the practice.

311 I also move for a new trial upon all the grounds set forth in section 1999 of the Code, excepting that of insufficiency or inadequacy of damage, on the minutes of the trial and the exceptions taken throughout.

The Court: Motions are denied and ninety days under the rule after entry of judgment in which to file a bill of exceptions and ninety days stay.

Mr. Rogers: I also move to set aside the verdict of the jury upon the ground that it is against the law, against the evidence, against the weight of evidence and upon all the grounds set forth in Section 1999 of the Code, except the insufficiency and inadequacy of damage, because the jury has not awarded damages to the plaintiff.

The Court: Denied.

Mr. Rogers: I except.

312 * PLAINTIFF'S EXHIBIT No. 1.

Cleveland, Ohio, December 28th, 1911.

For value received, The Lake Shore Film & Supply Company, a corporation organized and doing business in and under the laws of the State of Ohio, with its principal office at Cleveland, Ohio, hereby sells, assigns and transfer to J. H. Sampliner, all of its rights and interests, in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement, by and between, The

Motion Picture Patents Company, The Edison Manufacturing Company, the Essany Film Manufacturing Company, the Kalem Company, George Kleine, the Lubin Manufacturing Company, Pathe Freres, The Selig Polyscope Company, The Vitagraph Company, The Melies Manufacturing Company, and the General Film Company, all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore Film & Supply Company, and contrary to and in violation of the Sherman Anti-Trust Act, commonly known as the Sherman law.

In witness whereof, the said The Lake Shore Film and Supply Company, has caused these presents to be signed by its President, duly authorized thereunto, and has caused its corporate seal to be attached the day and year first above written.

THE LAKE SHORE FILM & SUPPLY COMPANY,

[CORPORATE SEAL.

By (Signed) E. MANDELBAUM, *President.*
(Signed) W. A. SHERMAN, *Sec.*

113 PLAINTIFF'S EXHIBIT No. 2.

Copy of Page 16 of the Corporation Record of the Lake Shore Film & Supply Company.

Minutes of First Directors Meeting.

(Stamp:)

Plff. Ex. No. 2 Id.
U. S. Dist. Court,
S. D. of N. Y.
Jun. 1, 1917.

114 PLAINTIFF'S EXHIBIT No. 3.

Copy of Page 19 of the Corporation Record of the Lake Shore Film & Supply Company.

Minutes of a Stockholders Meeting of the — of — The Lake Shore Film Supply Co. — Company, held at 303 Superior Bld., Cleveland, Ohio, Dec. 10th, 1908.

(Stamp:)

(Plff Ex. No. 3 Id.
U. S. Dist. Court,
S. D. of N. Y.
Jun 1 1917)

Meeting called to order by the President.
All Stockholders present.

Minutes of previous meetings read, same being adopted as read. Following resolution was introduced by Mr. Sherman:

Resolved, That the directors be increased to six instead of five. All votes being cast in favor of this motion, same was carried.

W. H. SHERMAN,
Sec.

MAX SCHACHTEL,
E. MANDELBAUM,
JOSEPH DIENER.

Resolved, That a dividend of 15% be declared on the capital stock of the company, payable at once.

315 All votes being cast in favor of this resolution, was was carried.

Motion was duly made and seconded and carried, authorizing the Pres. salary to be increased to Four thousand dollars a year.

Following motion was made by Mr. Schachtel: That a committee be appointed to purchase automobile. Same was seconded by Mr. Joe Diener and carried by a vote of all stockholders. Mr. Jacob Diener and Mr. Schachtel were appointed for same.

There being no further business, meeting adjourned.

W. A. SHERMAN,
Sec.

316 PLAINTIFF'S EXHIBIT NO. 4 FOR IDENTIFICATION.

In the District Court of the United States for the Southern District of New York.

L16—175.

JOSEPH H. SAMPLINER, Plaintiff,

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, et al. Defendants.

Cleveland, Ohio, May 28, 1917.

Appearances:

G. A. Rogers, Esq., for the plaintiff;
George F. Scull, Esq., for defendants, Thomas A. Edison, Incorporated, and others, and also representing Coudert Brothers.
S. O. Edmonds, Henry Melville and Charles F. Kingsley, attorneys for other defendants.

Mr. Rogers: I object to the taking of these depositions, upon the ground that the notice which was served is insufficient in form and insufficient as to the time of notice, and unreasonable as to the time

of notice for the taking of depositions therein referred to. The notice is dated May 26, 1917, which was Saturday, made returnable on May 28th, on Monday morning, at ten o'clock. It was
317 received by plaintiff's at about noon of Saturday, May 26th. Then it appears that the plaintiff is a resident of Cleveland, Ohio; that no notice was served upon him, and that his place of residence and office was nearest to the place designated in the office for the taking of the depositions; and also upon the ground that the subpœna served upon the witness now to be examined, W. A. Sherman, was served prior to the time that the notice of the taking of the deposition was served on the plaintiff's attorneys; that at the time when the subpœna was served, no notice had been served upon the plaintiff's attorneys.

Mr. Scull: The subpœna referred to by Mr. Rogers was served on this witness after a long distance communication from New York to the effect that his Honor, Judge Mayer, had postponed the taking of this witness' testimony, which had been noticed for Saturday, May 26th, at ten a. m., to Monday, May 28th, at ten a. m., the witness having been previously subpœnaed in due form for Saturday, May 26th, and a new subpœna was served as a matter of precaution. The notice referred to by Mr. Rogers was also served upon Mr. Rogers as a matter of precaution, a previous notice having been served on him on Friday, May 25th.

Mr. Rogers: I also object, in view of Mr. Scull's statement, to the insufficiency of the original notice served to take the deposition of this witness, upon the grounds stated as to the insufficiency of the notice and of the length of the notice therein given, the notice having been dated May 24, 1917, but not served until May 25, 1917, at twelve o'clock noon, returnable the following morning, May 26, at Cleveland, at ten a. m., upon the ground that that notice was
318 not served upon Mr. Sampliner, a party, who resides at Cleveland, Ohio, and who is nearest to the place where the deposition was to be taken, my understanding being that the provision of the Revised Statutes is to the effect that the notice is to be served upon either the party or the attorney, whoever is nearest to the point where the deposition is to be taken; and upon the further ground that the subpœna to the witness for the taking of this deposition was served before the notice to take the deposition was served upon the plaintiff's attorneys in New York; and upon the further ground that that subpœna is dated on the 24th of May, 1917, whereas the notice was not served until the following day, May 25, 1917.

Depositions of witnesses taken on behalf of the defendants, pursuant to notice, at 711 Cuyahoga Building, Cleveland, Ohio, on the 20th day of May, 1917, at ten o'clock in the forenoon and at subsequent times, before Charles W. Chestnutt, a Notary Public within and for the County of Cuyahoga, in the State of Ohio.

Mr. Rogers: There will be no objection to the taking of this witness deposition by a stenographer, thereafter to be written out, one copy to be furnished in typewritten form to the plaintiff's attorneys. Instead of taking the deposition of the witness in longhand, but in making this statement I distinctly do so with the proviso that any

delay in getting out the deposition in typewritten form shall not occasion a delay of the trial of the issue now set for trial before his Honor, Julius M. Mayer tomorrow, Tuesday, May 29th. In
319 making this statement it is subject also to the provision that the plaintiff will claim the right to suspend the taking of this deposition at twelve o'clock noon, for the purpose of taking the deposition of one Garrett Hobart, before Harry A. Cummings, Notary Public, at room 1119 Williamson Building, Cleveland, Ohio, pursuant to a notice given to the defendants to take the deposition of that witness.

Mr. Scull: Defendants' counsel by no means will concede any such thing, in view of the fact that the present depositions have been set by his honor for this particular day and time, and while perfectly willing to expedite the taking of all depositions in any way possible, defendants' counsel does not propose to have the taking of these depositions interfered with in any way, particularly because plaintiff's counsel has not done everything to expedite this hearing, he having been fifteen minutes late.

Mr. Rogers: That statement is so reprehensible that I won't even attempt to answer it. I have come here from New York, several hundred miles from the place at which the deposition is taken, on a notice served on me on Saturday, at a time when most offices in New York are practically closed for the day.

Mr. Scull: Are you willing to expedite the matter by reserving all objections to the competency, relevancy and materiality of the evidence, such objections to be reserved to be taken at the trial, with the exception that any evidence may be objected to upon the ground of the form of the question or on the ground that the evidence is not the best evidence.

320 Mr. Rogers: I will expedite matters to this extent, that I will agree that objections to the form of the question be taken at the time the question is propounded; that the statement of the grounds of objection as to materiality, competency or relevancy, need not be set forth in full or argued upon the record, but that a statement that it is objected to should have to be recorded at the time the question is propounded, and, if not objected to, the objection being waived.

Direct Examination.

WILLIAM A. SHERMAN, of lawful age, being by me first duly cautioned and sworn, as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Scull:

Q. What is your name, residence and occupation?

A. William A. Sherman, residence, 1689 Lee Road, Cleveland Heights; secretary and treasurer of The Burrows Brothers Company.

Q. Were you at one time connected with the Lake Shore Film and Supply Company?

A. Yes, sir.
Q. In what capacity?
A. I acted as secretary.
Q. Any other office?
A. No.
Q. Were you a director?
A. Yes, sir.
Q. At what time were you secretary and a director?
A. Well, I think from the date of the organization as a corporation.
Q. When was that, approximately?
A. I should say that was in 1905, 1906 or 1907 when we were incorporated; just what year that was I don't know.
321 Q. How long were you secretary and a director of the Lake Shore Film and Supply Company?
A. To 1912.
Q. What month?
A. I think it was in February or March.
Q. Did you continue to be a stockholder after that date.
A. A stockholder of the Lake Shore Film and Supply Company?
Q. Yes.
A. The Lake Shore Film and Supply Company was changed to the Mutual Film.
Q. At what time?
A. I think that was the first part of March, 1912.
Q. Were you a stockholder at the time of that change?
A. Yes, sir.
Q. Are you a stockholder of the Mutual Film Corporation?
A. No, sir.
Q. When did you sell your stock in the Lake Shore Film and Supply Company?
A. In March of 1912.
Q. And when did you resign as secretary and director of that company?
A. March, 1912.
Q. How much of the corporate stock of the Lake Shore Film and Supply Company did you own?
A. One share.
Q. And when you sold this one share, how much did you get for it?

Mr. Rogers: Objected to.

A. Well, sir, I couldn't tell you in cash just what I did get.
Q. Well, approximately what did you get?

Mr. Rogers: Objected to.

A. Well, I couldn't answer that question, for I don't remember just what I did get for my one share of stock.
322 Q. Did you get one dollar?
A. Oh, I got more than that.
Q. Did you get $100.00?

Mr. Rogers: Objected to.

A. I couldn't tell you. I couldn't for the life of me say what it was, whether it was less than $100.00 or not.

Q. What was the total capital stock of the Lake Shore Film and Supply Company?

A. $10,000.00.

Cross-examination of William A. Sherman.

By Mr. Rogers:

Q. (Handing witness paper.) I show you a paper dated Cleveland, Ohio, December 28, 1911, which I ask to have marked Plaintiff's Exhibit A for identification, which now bears the initials "C. W. C." of this date, which are the initials of Charles W. Chestnut, Notary Public, and I ask you whether the signature at the bottom of that paper is your signature?

Mr. Scull: Objected to on the ground that this is not proper cross-examination, it going into matters not touched upon in any way in the direct; and plaintiff's attorney is advised that if he persists in this line of examination, the witness will be considered his own witness.

A. Yes, sir, that is my signature.

Q. (Indicating on said Plaintiff's Exhibit A for identification.) I show you an imprint, with the word "Seal" to the left of your signature, and I will ask you whether that is and was at that
323 time the seal of the Lake Shore Film and Supply Company?

A. Yes, sir.

Q. Do you know who was the President of the Lake Shore Film and Supply Company on December 28, 1911?

Mr. Scull: Same objection.

A. Yes, sir.

Q. Who was the President?

A. Mr. Emanuel Mandelbaum.

Q. Are you familiar with his signature?

A. Yes, sir.

Q. Have you frequently seen his signature?

A. Yes, sir.

Q. And is the signature above the word "President" the signature of Mr. Mandelbaum, the President of the Lake Shore Film Company?

A. Yes, sir.

Q. With respect to December 28, 1911, do you recall about when this paper was signed, the date of it?

Mr. Scull: Same objection.

A. I think it was around December 12th or something like that.

Q. Look at the paper and see if that will refresh your recollection as to about when the paper was signed?

A. (After looking at paper.) It was signed December 28th, 1911.
Q. What action, if any, was taken by the board of directors of the Lake Shore Company with respect to this assignment prior to the time when you and Mr. Mandelbaum signed it?

Mr. Scull: Same objection.

324 A. Why, we had a meeting of the board of directors authorizing us to assign the claim to Mr. Sampliner.
Q. And was it pursuant to the action taken by the board of directors that you affixed your signature to this paper as the secretary of the corporation?

Mr. Scull: Same objection.

A. Yes.

Redirect examination of William A. Sherman.

By Mr. Scull:

Q. Where was this meeting of the directors to which you have testified, held?
A. It was held at the office of the Lake Shore Film and Supply Company.
Q. On what date?
A. Well, I think it was held the 1st of December, or the last of November.
Q. Have you any recollection of the date of your signing this paper, Plaintiff's Exhibit A for Identification, outside of and independently of the date which appears on that paper?
A. No, sir.
Q. And have you no recollection at all, independently of that date?
A. No, sir.
Q. It may have been in the early part of 1912, might it not?
A. No, sir, this claim was assigned in 1911.
Q. How do you fix the date 1911?
A. Well, for the simple reason that I went out of the Lake Shore in 1912, in March, and it was the previous year that we assigned the claim, it was right after the Christmas holidays, I remember that.
325 Q. Did you keep a minute book of the transactions of the board of directors and the meetings of the stockholders of the Lake Shore Film and Supply Company?

Mr. Rogers: Objected to.

A. Yes, sir.
Q. Do you know where that minute book is now?

Mr. Rogers: Objected to.

A. No, sir.

Q. Did you personally keep such a minute book, or were the minutes for such book prepared by others?

Mr. Rogers: Objected to.

A. I kept the book myself.

Q. And did such minutes show complete and accurate reports of all the transactions of the board of directors?

Mr. Rogers: Objected to.

A. I think they did.

Q. When did you last see this minute book?

A. I think it was about the 5th, 6th or 7 of March, 1912.

Q. Have you talked to Mr. Sampliner, or to Mr. Rogers as to the testimony which you were to give here this morning?

Mr. Rogers: Objected to.

A. Not anything special, no, sir.

Q. Well, to what extent did you talk to him about it?

A. I guess about the only thing I asked him was if I was going to be kept very long. He spoke to me off and on about certain
326 compiling of figures, of the old figures.

Q. At Mr. Rogers' request Mr. Sampliners produced the subpœna under which you appeared here; did you turn that subpœna over to Mr. Sampliner?

Mr. Rogers: Objected to.

A. Yes, sir.

Q. Why?

Mr. Rogers: Objected to.

A. Well, I said, "Here, I forgot to ask the fellow for the dollar before I would appear, and you can have my subpœna."

Q. Why did you think Mr. Sampliner would be interested in that subpœna?

Mr. Rogers: Objected to.

A. As a matter of fact, I didn't think anything about it. I was at his office, and I pulled it out of my pocket and left it lie there.

Q. Why were you at his office?

A. I ran up there for a few minutes Saturday afternoon and told him I was glad to get back to the store and that it was put over until Monday, because it was Saturday.

Q. Is Mr. Sampliner your attorney?

Mr. Rogers: Objected to.

A. No, sir.

Q. Was Saturday afternoon the only time that you talked to Mr. Sampliner about the testimony that you might give here today, or about your being subpœnaed?

Mr. Rogers: Objected to.

327 A. I didn't talk to him about my testimony Saturday.

Q. Did you talk to Mr. Sampliner at any time about the testimony which you were to give here this morning?

Mr. Rogers: Objected to.

A. No, sir.

Q. Have you ever been shown this paper, Plaintiff's Exhibit A for identification, any time within the last week?

A. I haven't seen the paper since the day I signed it.

Q. Were you present at this meeting of the board of directors about which you have previously testified, and at which, as you say, it was agreed to assign to Mr. Sampliner this claim of the Lake Shore Film Company?

A. Yes, sir.

Q. What was the consideration to be paid to the company for this assignment?

Mr. Rogers: Objected to, and I also object to the form of the question.

A. Mr. Sampliner was to cancel his account against us, for the claim.

Q. Had Mr. Sampliner ever submitted to the corporation any bill for his services?

Mr. Rogers: Objected to.

A. For the legal work in connection with originally the selling out of our interests to the Motion Picture Patents Company and the General Film Company, and for various conferences we had in regard to the cancellation of our license, with the Motion Picture Patents Company and the film manufacturers he had not submitted a bill.

328 Q. Have you discussed this matter of the assignment with Mr. Sampliner, at any time since March, 1912?

Mr. Rogers: Objected to.

A. Since we assigned the claim to him?

Q. Yes?

A. No, that ended it, when we assigned the claim to him.

Q. You haven't discussed with Mr. Sampliner this matter of the assignment or of the consideration for it, any time since you signed this paper, Plaintiff's Exhibit A for identification?

Mr. Rogers: Objected to.

A. No, sir.

Q. Have you discussed the matter of this consideration with Mr. Rogers?

A. No, sir.

Q. Have you discussed it with any one?

Mr. Rogers: Objected to.

A. No, sir.

Q. At the time you signed this paper, Plaintiff's Exhibit A for identification, was the Lake Shore Film and Supply Company indebted to any one for anything outside of its current bills?

Mr. Rogers: Objected to, and I also object to the form of the question.

A. Do you mean outside of merchandise and film accounts, or what?

Q. Outside of merchandise and film accounts.

Mr. Rogers: Same objection.

A. Yes, sir.

328 Q. What was the nature of that indebtedness?

Mr. Rogers: Same objection.

A. We were indebted to J. H. Sampliner.

Q. Was that the only indebtedness that you can recall, outside of merchandise and films?

Mr. Rogers: Objected to.

A. We might have owed some accounts that were expense accounts, nothing outside of that, I don't think. It is a long while to remember every little account.

Q. During the month preceding December 28, 1911, what was the average cash balance of the Lake Shore Film Exchange in the bank in which it deposited its moneys?

Mr. Rogers: Objected to, and I also object to the form of the question, and also upon the ground that it is not the best evidence.

A. That would be a hard thing to answer, but I guess very small.

Q. In what bank or banks did the Lake Shore Film and Supply Company carry an account in December, 1911?

Mr. Rogers: Objected to.

A. In the National City Bank, if I am not mistaken.

Q. Was that the only one?

Mr. Rogers: Objected to.

A. Yes, sir.

329 Recross-examination of William A. Sherman.

By Mr. Rogers:

Q. Mr. Scull has asked you about a subpœna (handing witness paper). I show you a copy of the first subpœna, dated May 24, 1917, and I ask you when that was served on you?

A. If I remember right, it was about ten or half-past ten on Friday morning, May 25th.

Q. (Showing witness paper.) And I show you subpœna dated May 26, 1917, and ask you what time that was served on you and on what date?

A. That was served Saturday, the 26th, around twelve o'clock, half-past eleven or twelve, it was about noon.

Q. So far as you know, did the Lake Shore Company, after the signing of this paper, Plaintiff's Exhibit A for identification, have or retain any interest whatever in the subject matter assigned or attempted to be assigned in that instrument to Mr. Sampliner?

A. No, sir.

Q. Had Mr. Sampliner's services been frequently requested and was he acting as the attorney for the Lake Shore Company in connection with the controversy between the Patents Company and the licensed manufacturers and the Lake Shore Company prior to December 28, 1911?

Mr. Scull: Objected to.

A. Yes, sir.

Q. You have spoken of the cancellation of the license agreement of the Lake Shore Company; please state what you mean by that?

A. They had refused to sell us films or to allow the film manufacturers to serve us with films.

Q. When you say "they," who do you mean by "they"?

A. The Motion Picture Patents Company.

331 Q. Now you have said something about the sale of the business of the Lake Shore Company to the Patents Company and the General Film Company; what did you mean by that?

Mr. Scull: Objected to.

A. The General Film Company had agreed to buy us out.

Q. Did they buy you out?

A. No, sir.

Q. What occurred, if anything?

Mr. Scull: Objected to.

A. Mr. Willis, the representative of the General Film Company, was here on a visit, and we asked him how long he expected to stay in Cleveland; and he pulled a letter out of his pocket and handed it to Mr. Mandelbaum, stating that he was to turn the Lake Shore Film and Supply Company over to Mr. Willis, and he was to take charge.

Q. What, if anything transpired about that?

A. Telegrams in connection with Mr. Willis's taking charge without any papers being signed up of the sale or any money paid down.

Q. Did the Lake Shore Company permit Mr. Willis to take charge of the business?

Mr. Scull: Objected to.

A. No, sir.

Q. What happened subsequently to its refusal to permit Mr. Willis to take charge, if anything, in connection with Mr. Sampliner's acting or his services?

Mr. Seull: Objected to.

A. Mr. Mandelbaum saw Mr. Sampliner right off.

Q. What, if anything, occurred?

Mr. Seull: Objected to.

A. After we refused to turn the Lake Shore over to Mr. Willis?

Q. Yes?

Mr. Seull: Objected to.

A. We received a telegram from the General Film Company.

Q. Without stating what was in that telegram, after the receipt of that telegram, what became of the negotiations, or the so-called negotiations, for the transfer from the Lake Shore to the General Film Company, if you know?

Mr. Seull: Objected to.

A. Mr. Willis left our office and did not appear again.

Q. And what happened to the negotiations?

Mr. Seull: Objected to.

A. They were ended right there.

Q. At or about that time was there a film company operating in Cleveland, Ohio, known as the United Film and Supply Company?

Mr. Seull: Objected to.

A. Yes, sir.

Q. Do you recall the full name of that company?

A. I think it was the United Film and Supply Company. Mannie would know.

Q. When you say "Mannie," do you mean Mr. Mandelbaum?

A. Mr. Mandelbaum, yes, sir.

Q. Are you familiar with film conditions in Cleveland at that time?

Mr. Seull: Objected to.

A. Yes, sir.

Q. Do you know the exchanges or companies that were operating in Cleveland at or about the time we are now discussing?

Mr. Seull: Objected to.

A. Yes, sir.

Q. At or about the time the negotiations with the Lake Shore Company were terminated for the transfer of its business to the General Film Company, do you know of your own knowledge what

anything happened with regard to the United Film and Supply Company?

Mr. Scull: Objected to.

A. Yes, sir.
Q. What happened?

Mr. Scull: Objected to.

A. Mr. Willis took charge of the United Film Company.
Q. Was there a change in the United Film Company, if you know of your own knowledge?

Mr. Scull: Objected to.

A. Yes, sir.

334 Q. What was that change?

Mr. Scull: Objected to.

A. The General Film Company purchased the United Film Company out, and changed its name to the General Film Company.

Mr. Scull: The answer is objected to as being clearly without the knowledge of the witness.

Q. State what your knowledge was of the change in the name of the United to the General Film Company?

Mr. Scull: Objected to.

A. The General Film Company had their name put on the windows, with the "United" crossed off and the "General Film Company" painted on.
Q. Was it commonly known in the trade, as a matter of general report, that the business of the United was now being conducted under the name of the General Film Company?

Mr. Scull: Objected to.

A. Yes, sir.
Q. After the acquisition, as you testified, of the United branch by the General Film Company, was there a series of transactions between the Motion Picture Patents Company and the Lake Shore Company, with respect to the exchange of the license agreement of the Lake Shore Company with the Motion Picture Patents Company?

Mr. Scull: Objected to.

335 A. I don't remember, outside of that we sent our royalties to them each week.
Q. About February 17, 1911, did a communication come to the Lake Shore Company from the Motion Picture Patents Company?

Mr. Scull: Objected to.

A. Yes, sir.

Q. In the early part of March, 1911, what if anything occurred with regard to the relations between the Lake Shore Company, the Motion Picture Patents Company and the licensed manufacturers?

Mr. Scull: Objected to.

A. The Motion Picture Patents Company refused to allow the film manufacturers to ship us any more film.

Mr. Scull: Objected to.

Q. Did you get any film from the licensed manufacturers subsequent to about the first week of March, 1911?

Mr. Scull: Objected to.

A. Yes, sir.

Q. Up to about what time did you get film from the licensed manufacturers, after the first part of March, 1911?

Mr. Scull: Objected to.

A. Subsequent to or prior to March, 1911?

Q. The question is, subsequent to the first week of March, 1911?

A. We received them right along.

336 Mr. Rogers (to the Notary): Will you read the question to him, please?

Mr. Scull: This being direct examination, and the witness having answered the question, objection is made to any attempt on the part of counsel to elicit the answer that he wants.

Mr. Rogers: I wish to give notice right now, on the record, that there is a limit to every man's patience. Mr. Scull is pretty well known in New York, and I want to say that these interruptions are offensive and must not be repeated. If he continues in this line of remark, I shall go before a Federal Judge in this district and ask that Mr. Hauxhurst, who has been present throughout this examination, and who I understand is a lawyer of repute and ability, be asked to conduct the taking of the depositions further, or that the taking of the depositions be suspended until other counsel can be substituted in Mr. Scull's place. I ask that the Notary repeat the last question to the witness, who evidently didn't understand the question.

Q. (Last question read to witness).

A. We received film right along up to March, 1911.

Q. After the first week of March, 1911, what if anything did the licensed manufacturers do with respect to deliveries of film?

Mr. Scull: Objected to.

A. They canceled our license, and refused to ship us film.

337 Q. Throughout these transactions which you have been now narrating, the negotiations for the sale of the business of the Lake Shore Company to the General Film or the Patents Co.

pany, or both, as you have testified, the acquisition by the General Film Company of the United branch, the cancelation of the license agreement by the Patents Company, and the refusal of the manufacturers to deliver the film to the Lake Shore Company, were Mr. Sampliner's services requested and did he act for the Lake Shore Company in those matters?

Mr. Scull: Objected to.

A. Yes, sir.

Q. Who was the attorney for the Lake Shore Film and Supply Company in the period from about March, 1910, to December, 1911?

A. J. H. Sampliner.

Q. Did it have any other attorney?

A. No, sir.

Q. Was he the general counsel for the company throughout that time?

Mr. Scull: Objected to.

A. Yes, sir.

Redirect examination of William A. Sherman.

By Mr. Scull:

How soon after you were served with the first subpœna, dated May 24, 1917, did you call up Mr. Sampliner and tell him that you were served with such a subpœna?

Mr. Rogers: Objected to.

A. I think it was about, I don't know whether it was twelve o'clock or one o'clock.

Q. Shortly after you were served, that is?

A. Yes, a couple of hours or so.

Q. Didn't you turn immediately to your telephone and call him up and tell him that you had been served?

Mr. Rogers: Objected to.

A. No, sir.

Q. Did you try to get him on the telephone for that purpose?

Mr. Rogers: Objected to, and I also object to it on the ground that this is an utter waste of time, in view of the fact that Mr. Scull has several witnesses under subpœna whose depositions are to be taken in time for us to make a train to get back to New York; and I give notice now that Mr. Scull is unnecessarily prolonging this examination.

Mr. Scull: That is all.

WILLIAM A. SHERMAN.

339 PLAINTIFF'S EXHIBIT No. 5.

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY et al., Defendants.

Plaintiff's Second Bill of Particulars as to Services Rendered as Attorney, etc.

During the month of July, 1910, Mr. E. Mandelbaum, who was president of the Lake Shore Film & Supply Company, conferred with the plaintiff regarding negotiations for the purchase by the General Film Company of the assets of the Lake Shore Company to be operated as a branch of the General Film Company. During this interview the previous operations of the defendants against the other rental exchanges throughout the country, their cancellation of licenses of rental exchanges, and their conduct toward exhibitors and against the cancelled or so-called unlicensed exchanges were discussed. Plaintiff also obtained statement from Mr. Mandelbaum as to the history leading up to the making of the exchange license agreement bearing date approximately January 14th, 1909 and the operations of the defendants under the so-called license agreement. This interview lasted approximately three hours.

340 Later, at a subsequent interview in the said month of July, 1910, plaintiff received from the Lake Shore Film & Supply Company a copy of its license agreement with the defendant Motion Picture Patents Company, and also correspondence, notices, bulletins, etc., from defendants Motion Picture Patents Company and the other defendants, which he was requested to examine and pass upon in connection with the contemplated compulsory sale to the General Film Company in the interests of all of the defendants. Thereafter and in the said month he had several interviews with the aforesaid Mandelbaum, in relation to the said sale and negotiations therefor, as well as the legal position of the said Lake Shore Company under the license agreement, and its right and remedies generally. That during the period of approximately three weeks before the said Mandelbaum came to New York for conference with the representatives of the defendant regarding the sale, the plaintiff spent the greater part of his time on the said matter and the examination of the legal questions involved, and also conferred with the President of the Lake Shore Company on the matter, and that the time consumed was approximately one hundred hours.

Upon the return of the President of the Lake Shore Company from New York, where he had conferred with the representatives of the defendants, he reported to the plaintiff the results of the negotiations at the interviews there had, and went over the details with the plaintiff on the contemplated purchase by the General Film

Company, in the interests of the defendants, of the business of the Lake Shore Company. That interview lasted approximately
341 two hours.

Plaintiff subsequently discussed with the President and arranged for the necessary meetings of stockholders and directors of the Lake Shore Company for the purpose of having the transfer legally perfected under the laws of Ohio, under which the Lake Shore Company was incorporated, including examinations into the authorities as to the validity of the transfer under the State and Federal Laws and the validity of the preferred stock of the General Film Company, which was to be part of the purchase price, and the right of recovery upon the deferred payments to be made by the General Film Company, and in the incidental examination of a set of papers or agreements used by the said General Film Company in connection with the transfer or sale of a similar license rental exchange. These services were performed about the middle of August, 1910, and extended over several days, and consumed approximately forty hours.

Toward the end of August complications arose in the matter of the transfer to be made, by the presence of one, J. E. Willis, seeking to take possession of the Lake Shore Company's business under a letter of authority from the General Film Company. As a result of this attempt to take possession, the President of the said Lake Shore Company conferred with the plaintiff as to the rights of the said General Film Company to take possession, or the legal position or status of the said Lake Shore Company if it permitted possession to be taken. That he supervised and assisted in the prepara-
342 tion of correspondence upon the said subject between the said Lake Shore Company and the said General Film Company and the defendant Waters. That the controversy regarding this possession, or attempt to take possession extended over a period of approximately four days, during which time the plaintiff was engaged in conferences from time to time with the President of the said Lake Shore Company, and spent approximately eight hours.

The General Film Company having notified the said Lake Shore Company for its alleged "Disobedience" they would now call off the negotiations.

On about September 3d, plaintiff had conferences with Mr. Mandelbaum in relation to the communications from the General Film Company, breaking off negotiations, and conferred as to measures of protection against future attack. Plaintiff continued research, that day and on several succeeding days, into the law upon plaintiff's assignor's remedy in the event of cancellation of the defendant's license by the Motion Picture Patents Company. The time devoted to this was approximately twenty-five hours.

During the month of September, 1910, plaintiff had several conferences with the President of the Lake Shore Company, re the purchase by the General Film Company of the business of the United Film Company and representations alleged to have been made to the said United Company that the Lake Shore Company had sold out to the General Film Company, to induce it to sell its business, so

that the United might be operated as a branch of the General
343 Film Company, and as to the remedy of the Lake Shore Company. The time devoted to these conferences were approximately twenty hours.

From the middle of September, 1910 to February 17th, 1911, plaintiff was frequently consulted in regard to conditions then existing in Cleveland and elsewhere, in which the Lake Shore Company were interested, by reason of the unfair competition of General Film Company with the Lake Shore Film Company, and the illegal methods adopted by the defendants in attempting to drive the Lake Shore Company out of business. These consisted of conferences and examinations into the law to ascertain what remedy the Lake Shore Film Company had, or recourse for the loss of business they were sustaining through these operations.

These services extended over a period of several months, during which time almost daily the plaintiff was consulted in regard to situations that had arisen, and others that were arising, and was almost continuously in consultation with the President of the Lake Shore Company, regarding the operations of the defendants, and particularly the representatives of the General Film Company, in an effort to get the customers of the Lake Shore to leave that Company and to give their business to the branch of the General Film Company which was operated in place of the United Company, which it had purchased, and also with reference to the cutting off of the credit of the Lake Shore Company by defendants "Licensed Manufacturers." The plaintiff cannot at this time particularize the exact number of hours so expended on these services but
344 would say that he devoted at least two hundred hours.

About February 18th, 1911, plaintiff's assignor was in receipt of a notice of cancellation if its license agreement by the Motion Picture Patents Company to become effective March 7th, 1911. Between these two dates the plaintiff devoted himself almost exclusively toward investigation of a remedy at law or in equity to prevent the cancellation of the license, and also as to right or remedy compelling Licensed Manufacturers to continue to supply the Lake Shore Company with the necessary film, and devoted many hours to the examination of the law and authorities toward that end, and was almost continuously in consultation with the President of the Lake Shore Company. That the time devoted to these services were approximately one hundred hours.

From and after March 7th, 1911, to November, 1911, the plaintiff performed general services for the Lake Shore Company, which included, among other items, the following: Examination into the right to equitable relief to restrain the defendants Licensed Manufacturers from replying film in possession of the Lake Shore Company, upon which the plaintiff spent many hours, beginning with March, 1911, and for several weeks thereafter, and to prevent the Licensed Manufacturers from doing what had been reported had been attempted by them or some of them with regard to films of the Schwab Exchange at Philadelphia, Pennsylvania; also arranged with the Bankers' Surety Company at Cleveland, Ohio, for re-

345 londing of any film that might be seized or attempted to be seized by the Licensed Manufacturers under writs, if issued.

The time employed upon this item was between fifty and sixty hours.

Plaintiff had interviews with the President of the Lake Shore Company with respect to threats and intimidation practiced upon the exhibitors, who were dealing with the Lake Shore Company, committed or perpetrated by the representatives of the defendants in attempting to sway the exhibitors from using the film handled by the Lake Shore Company, subsequent to the cancellation of the license, and also investigated the law with respect to what steps, if any, could be taken to prevent the defendants from restraining the customers of the Lake Shore Company to exhibit films supplied to them from the said Lake Shore Company. These services extended over a period of several weeks and to which plaintiff devoted approximately sixty hours.

On and after about March 7th, 1911, plaintiff was consulted by the Lake Shore Company, regarding the refusal or alleged refusal of the defendants' Licensed Manufacturers to continue supplying the film or their product to the Lake Shore Company, and as to a remedy to compel them to make such supply. The plaintiff examined into the law and authorities with respect to this situation. These services extended over a period of several weeks and to which plaintiff devoted approximately twenty-five hours.

The plaintiff also subsequent to March 7th, 1911, and for several weeks, made a thorough and complete study in addition to the earlier investigations into the Federal Anti-Trust Law, at the request 346 of the President of Lake Shore Company, so that he might be able to advise him fully as to their remedies at law, for the past conduct and performance of the defendants, which embraced the examination of the Anti-Trust Acts and decisions thereunder from the earliest decisions up to and including the fall of 1911. That the time devoted to this examination of authorities, in addition to the time already expended was approxmately two hundred hours.

That the plaintiff from on or about July, 1910, to the end of December, 1911, had acted as the general counsel for the said Lake Shore Company and was in continuous charge of their legal affairs which had become complicated and complex and laborious, by reason of the activities of the defendants against the Lake Shore Company, and advised with the President of the Lake Shore Company, as to preventive methods of attacks of the defendants upon the said Lake Shore Company, and so far as legally could be accomplished by the plaintiff, to prevent the disorganization and destruction of the business of the Lake Shore Company, including the examinations into the rights of the defendants to have the so-called projecting machine "royalties" paid to them.

In addition to the services which the plaintiff had already performed at the time of the assignment, the plaintiff agreed with his assignor, that if the defendants or any of them attempted to further harass or annoy the Lake Shore Company, its officers or directors or either or both of *of* them, that he would defend and render his services in any such actions or proceedings brought against them or

any of them under the claim or claims alleged to arise by
347 reason of or under so-called cancellation of the license agreement. The assignment to the plaintiff was an absolute assignment, and he, at that time, became, and is still the sole owner of the subject matter of the said assignment.

ROGERS & ROGERS,
Attorneys for Plaintiff.

Office and P. O. Address, No. 66 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York ss:

JOSEPH H. SAMPLINER, being duly sworn, deposes and says:

That he is the plaintiff in the within action; that he has read the foregoing bill of particulars as to services rendered as attorney, etc., and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOSEPH H. SAMPLINER.

Sworn to before me, this 23rd. day of May, 1917.
NATHAN FRANKEL,
Notary Public, New York County, No. 113.

348 PLAINTIFF'S EXHIBIT No. 6.

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY et al., Defendants.

Plaintiff's First Bill of Particulars.

Plaintiff files the following bill of particulars herein:

As to demand 1: Excepting insofar as the rental exchanges conducted by the defendants, Lubin Manufacturing Company or Sigmund Lubin or George Kleine, may or may not have been in competition with the Lake Shore Film & Supply Company (the plaintiff's assignors), and also with the Lake Shore Film & Supply Company, a partnership, the predecessor of the said corporation, there is no claim made herein that the defendants were in competition with the plaintiff's assignor, the Lake Shore Film & Supply Company at the time mentioned in paragraph Seventh.

The competition mentioned in paragraph Seventh was the competition between and among the defendants' "Licensed Manufacturers,"

Who were competing with each other for the business of the rental exchanges, and of which the plaintiff's assignor and the part-
349 nership prior to the incorporation of the Lake Shore Company, was one.

As to demand 2: The principal patent referred to in paragraph Thirty-sixth is the so-called Edison Film Patent in its original or reissued form; the number of the reissued patent being 12,192.

As to demand 3: Upon information and belief, the numbers of the several patents of no value to the art are 578,185, 580,749, 586,953, 588,916, 629,063, 673,329, 673,692, 707,934, 722,382, 744,251, 770,937, 771,280, 785,205, 785,237.

As to demand 4: Upon information and belief, the names of the defendants referred to in paragraph Sixtieth of the complaint are Motion Picture Patents Company, and defendants known as "Licensed Manufacturers." The persons or instrumentalities by which the information was communicated are as follows: viz: William Rock, William N. Selig, Sigmund Lubin, George Spoor, Harry N. Marvin, Frank L. Dyer and George Kleine. The said names are furnished without limiting the plaintiff that the statements were made by all of the said persons, but for the purpose of giving the names of such persons as plaintiff will claim upon the trial, directly or indirectly, either individually or as officers of the corporation defendants, made statements and representations to the rental companies or their representatives at the time and places referred to in paragraph Sixtieth, of the complaint.

As to demand 5: Upon information and belief, these representations and promises were made by the defendants Motion Pic-
350 ture Patents Company and those designated as "Licensed Manufacturers," but the persons through whom, upon information and belief, these representations were made, were either Frank L. Dyer or Harry N. Marvin, or both.

As to demand 6, the plaintiff is unable at this time to state the names of the persons upon whose behalf the Lake Shore Film & Supply Company was obliged to make payment of royalties, and the amount paid on behalf of each during the period from 1909 to March, 1911; but, upon information and belief, alleges that the amount of $25,000, as alleged in paragraph Seventy-first of the complaint, is made up as follows: From February 1, 1909, to on or about March 1, 1911, the said Lake Shore Company had an avverage of 120 customers per week, which is supplied with motion picture films, which makes an average payment at the rate of $2.00 per week from each customer or a total of $240.00 per week; at the rate of $240.00 for an approximate period of 104 weeks makes a total sum of $24,960.00 upon information and belief, that the method by which this payment was made was that the Lake Shore Film Company sent to the Motion Picture Patents Company a list of the customers or exhibitors on whose behalf the payment was made, together with check or remittance for the said customers or exhibitors, and that there is or should be upon the books of the defendant Motion Picture Patents Company the names of every and all of the exhibitors on whose behalf these payments were usually weekly made. That

the dates of some of the payments, and the amounts thereof and referred in the said paragraph Seventy-first of the complaint,
351 are set forth in the attached schedule marked: "Statement of some of the $2.00 Per Week Payments made, for which the Defendant Motion Picture Patents Company Issued Its Formal Written Receipts;" the receipts issued for these payments was in the form of which the following is a sample:

"Motion Picture Patents Company.

80 Fifth Avenue, New York.

January 7, 1911.

X50.

Lake Shore Film & Supply Co.
105-108 Prospect Avenue, S. E.,
Cleveland, Ohio.

We acknowledge receipt of Exhibitors Royalties (101) forwarded by you for week beginning January 2nd, amounting to Two Hundred and two — Dollars, ($202.00).

MOTION PICTURE PATENTS COMPANY,
By J. J. KENNEDY,
Treasurer."

As to demand 7, upon information and belief, the total footage is approximately 1,700,000 feet. The exact footage, upon information and belief, appears in the books of account of the Lake Shore Company, but which the plaintiff at this time has not in his possession, nor has he access thereto. It also appears in the books of account of the defendants Licensed Manufacturers, by computing the total amount delivered by each of the licensed manufacturers to the plaintiff's assignor during the period named.

The excess price exacted from the plaintiff's assignor was
352 between two and two and one-half cents per foot.

As to demand 8; the number of reels was approximately 1,500 reels, the average cost of which was $50.00, and the value of each at the time of the return was approximately $20.00 per reel. The plaintiff is unable at this time to state the footage, brand and subjects of each reel of film returned, but, upon information and belief, states that the same is contained in the books of account of the plaintiff's assignor, which are not now in his possession nor has he access thereto, and, upon information and belief, also to be found in the books of account of the defendants Licensed Manufacturers, or defendant Motion Picture Patents Company, or both.

As to demand 10: The assets consisted of motion picture film on hand, projection machine and parts thereof, and other appurtenances for the giving of moving picture exhibitions, and book accounts for moneys due for film delivered by the plaintiff's assignor to its customers; and the liabilities were debts contracted, mainly with the

defendants Licensed Manufacturers for the motion picture films that had been delivered. The plaintiff is unable at this time to set forth the separate figures constituting the assets and liabilities, excepting to state, upon information and belief, that at the time set forth in paragraph Ninety-fourth of the complaint the value of the assets in excess of the liabilities was over and upwards of $85,000.00.

As to demand 11: the plaintiff is unable at this time to furnish the details requested by the demand marked "11," the particulars of which more fully appear by the books of account of the
53 Lake Shore Film & Snupply Company, which are not at this time in the possession of the plaintiff; the details, however, for the period from January 1, 1911, to March 1, 1911, are hereinbelow set forth, upon information and belief.

			Gross Profits.
Proceeds from Film Rental		$196,365.86	
Cost of Films	$125,048.94		
Less inventory of said films for future use	32,500.00	92,548.94	$103,816.92
Merchandise Sales		35,003.19	
Cost of Merchandise		23,127.87	11,875.32
Merchandise Rentals			1,465.59
Poster Sales		3,442.04	
Cost of Posters		3,224.49	217.55
Song Slide Rentals		5,256.86	
Cost of Song Slides		2,544.89	1,711.97
			$119,087.35

DISBURSEMENTS.

Insurance	539.03	
Traveling Expenses	2,476.90	
Royalties for Exhibitors to Patents Company	11,106.00	
General Expenses	39,963.73	54,085.66
Net profits		$65,001.69

54 As to demand 12: upon information and belief, the approximate number of reels was the difference between the number of reels which the Lake Shore Film Company had on hand at the time of the insurance of the so-called "Exchange license agreement," plus the number of reels purchased or leased from the Licensed Manufacturers from or on about January, 1909, to on or about July 17, 1910, after deducting therefrom the approximate 1500 reels which the plaintiff's assignor delivered to the defendant Licensed Manufacturers, as more particularly set forth in paragraph

Seventy-fifth of the complaint. That these figures will more particularly appear from the books of account of the said Lake Shore Company, and also from the books of account of the defendant Licensed Manufacturers; that the said number of films based upon these calculations would be approximately 1,500 reels; that the average value of these films on February 17, 1911, was approximately $25.00 per reel. The plaintiff is unable at this time to state the names of the subjects, the brands and the footage and he has no independent knowledge thereof excepting as the same will appear from the books of account of the plaintiff's assignor and from the books of account of the defendant Licensed Manufacturers, showing the delivery of films made by them during that period to the plaintiff's assignor.

The plaintiff is unable at this time to furnish a list of the moving pictures with respect to demand 13; but upon information and belief the names of the subjects, brands and footage would appear in the books of account of the plaintiffs assignor, which are not in
355 plaintiff's possession and to which he has not at this time access, and also appears in the books of accounts of the defendant Licensed Manufacturers, the same being the deliveries made by the said Licensed Manufacturers to the plaintiff's assignor during the seven months preceding February 17, 1911. The approximate number of said reels is 720. The average cost of each reel would be approximately $110.00. These reels as alleged in paragraph One Hundred Twenty-second of the complaint, the plaintiff's assignor was deprived of the use of for the intended minimum period of seven months, and prior to the cancellation of the Exchange License Agreement the plaintiff's assignor did not have the full use and benefit of the said films for which it had paid to the defendant Licensed Manufacturers the approximate sum of $75,000 upon such expectancy.

As to demand 14; the name of the attorney is J. H. Sampliner, and the services performed by him were as attorney, with reference to the matters set forth in paragraphs Ninety-fourth to One hundred sixteenth, inclusive, and such other services as might grow out of or be incidental or subsequent thereto.

As to demand 15; copy of the assignment is set forth below.

"Cleveland, Ohio, December 28th, 1911.

For value received, the Lake Shore Film & Supply Company, a corporation organized and doing business in and under the laws of the State of Ohio, with its principal office at Cleveland, Ohio, hereby sells, assigns and transfers, to J. H. Sampliner, all of its rights and interests, in and to any and all damages which it has sus-
356 tained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in, and as a result of the unlawful agreement, by and between, The Motion Picture Patents Company of New York City, The American Mutiscope & Biograph Company, The Edison Manufacturing Company, The Essanay Film Manufac-

turing Company, The Kalem Company, George Kleine, The Lubin Manufacturing Company, Pathe Freres, The Selig Polyscope Company, The Vitagraph Company, The Melies Manufacturing Company, and The General Film Company, all of said parties having conspired together for the purpose of ruining and destroying the business of The Lake Shore Film & Supply Company, and contrary to and in violation of the Sherman Anti-Trust Act, commonly known as the Sherman Law.

In witness whereof, the said The Lake Shore Film & Supply Company, has caused these presents to be signed by its President, duly authorized thereunto, and has caused its corporate seal to be attached the day and year first above written.

THE LAKE SHORE FILM & SUPPLY COMPANY.

[CORPORATE SEAL.]

(Signed) By E. MANDELBAUM,
President.

(Signed) W. A. SHERMAN,
Secretary."

237 As to demand 16; the item as shown in

Paragraph Seventy-first of complaint	$25,000.00
" Seventy-second of complaint	40,000.00
" Seventy-fifth and One Hundred and Nineteenth of complaint	25,000.00
" One hundred and Twentieth of complaint	10,000.00
" One Hundred Twenty-second of complaint	50,000.00
" One Hundred Twenty-fifth of complaint	5,000.00
Decreased profits from October 1, 1910, to February 17, 1911	20,000.00
Decreased profits from February 17, 1911, to December 28, 1911	45,000.00
Goodwill and value of business; decreased value of merchandise; and similar incidental damage affecting goodwill and depreciation of stock on hand	100,000.00

Dated, New York, April 6, 1917.

ROGERS & ROGERS,
Attorneys for Plaintiff.

Office and Post Office Address, 160 Broadway, Borough of Manhattan, New York City.

358 Statement of Some of the $2.00 Per Week Payments Made, For Which the Defendant Motion Picture Patents Company Issued Its Formal Written Receipts:

July 30, 1909	$168.00
December 2, 1910	176.00
July 9, 1909	160.00
November 12, 1910	2.00
November 12, 1910	2.00
November 4, 1910	4.00
November 12, 1910	190.00
November 4, 1910	176.00
July 16, 1909	152.00
July 22, 1909	158.00
July 2, 1909	162.00
April 8, 1910	4.00
April 4, 1910	180.00
April 25, 1910	192.00
May 6, 1910	6.00
May 6, 1910	186.00
May 20, 1910	198.00
May 9, 1910	4.00
May 27, 1910	200.00
June 23, 1910	192.00
June 20, 1910	4.00
June 17, 1910	200.00
June 17, 1910	8.00
May 13, 1909	146.00
June 27, 1909	4.00
May 11, 1909	2.00
May 28, 1909	146.00
May 21, 1909	150.00
June 19, 1909	176.00
August 13, 1909	182.00
August 5, 1909	172.00
359 September 10, 1909	182.00
September 3, 1909	192.00
January 23, 1911	6.00
February 17, 1911	2.00
February 17, 1911	188.00
January 23, 1911	200.00
January 28, 1911	2.00
June 1, 1910	2.00
June 3, 1910	2.00
June 3, 1910	198.00
June 10, 1910	196.00
June 10, 1910	4.00
November 21, 1910	186.00
December 19, 1910	2.00
December 28, 1910	176.00

January 3, 1911	6.00
February 3, 1911	206.00
February 10, 1911	196.00
February 10, 1911	4.00
January 7, 1911	10.00
January 7, 1911	2.00
January 28, 1911	204.00
September 24, 1909	194.00
September 17, 1909	196.00
August 27, 1909	186.00
November 26, 1910	190.00
December 19, 1910	184.00
December 28, 1910	6.00
January 3, 1911	2.00
January 3, 1911	192.00
February 28, 1911	2.00
February 10, 1911	2.00
January 16, 1911	200.00
January 7, 1911	202.00

360 STATE OF NEW YORK,
County of New York,
Borough of Manhattan, ss:

Joseph H. Sampliner, being duly sworn, deposes and says that he is plaintiff in the within action; that he has read the foregoing bill of particulars and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true. JOSEPH H. SAMPLINER.

Sworn to before me, this 6th day of April, 1917.
NATHAN FRANKEL,
Notary Public, N. Y. Co., No. 113.

361 *Notice as to Bill of Exceptions.*

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff in Error,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William E. Selig, George K. Spoor, Percival Waters, Defendants in Error.

Please take notice that the following constitutes the Plaintiff's Bill of Exceptions herein.

1. Summons and Complaint.
2. Answers of the Defendants.
3. Order directing trial of the issue of champerty, entered May 29, 1917.

362 4. Re-settled order directing trial of issue of champerty and plaintiff's title, entered May 31, 1917.

5. The evidence consisting of the stenographer's minutes and copy of which is hereunto appended, to be amended as proposed by the following amendments.

6. The following Exhibits.

7. Plaintiff's Exhibit No. 1, assignment of cause of action against Motion Picture Patents Company, by Lake Shore & Supply Company, to the plaintiff, dated December 28, 1911.

8. Plaintiff's Exhibit No. 2, page 16 of Minute Book of Lake Shore Film & Supply Company.

9. Plaintiff's Exhibit No. 3, page 19, Minute Book of Lake Shore Film & Supply Company.

10. Plaintiff's Exhibit No. 4 for identification—Deposition of witness William A. Sherman, taken in Cleveland, Ohio.

11. Plaintiff's Exhibit No. 5, plaintiff's Bill of Particulars, verified May 23, 1917.

12. Plaintiff's Exhibit No. 6, plaintiff's Bill of Particulars, dated April 6, 1917.

13. Defendant's Exhibit A, for identification; letter from E. Mandelbaum, dated January 31, 1913.

14. Amendatory Judgment, entered on September 5, 1917.

363 And that the plaintiff in error, plaintiff below, will present the same for settlement to the Honorable Julius M. Mayer, at his Chambers in the Woolworth Building, Borough of Manhattan, City of New York, on the 9th day of October, 1917, at 10:00 o'clock A. M., of that day.

Dated, New York, October 3d, 1917.

ROGERS & ROGERS,
Attorneys for Plaintiff in Error.

Office and Post Office Address, 66 Broadway, Borough of Manhattan, City of New York, N. Y.

To:

Coudert Brothers, Esqrs., Attorneys for Defendants, Pathe Freres and Jacques A. Berst, 2 Rector Street, Borough of Manhattan, City of New York, N. Y.

Charles F. Kingsley, Esq., Attorney for Defendants, Harry N. Marvin, Motion Picture Patents Co., Biograph Company, Jeremiah

J. Kennedy, 16 Park Row, Borough of Manhattan, City of New York, N. Y.

George F. Scull, Esq., Attorney for Defendants, Thomas A. Edison, Inc., William Pelzer, Kalem Company, Frank L. Dyer, 149 Broadway, Borough of Manhattan, City of New York, N. Y.

364 Samuel Owen Edmonds, Esq., Attorney for Defendants, Albert E. Smith and Vitagraph Company of America, 32 Liberty Street, Borough of Manhattan, City of New York, N. Y.

Dwight Macdonald, Esq., Attorney for Defendant, Percival Waters, 15 William Street, Borough of Manhattan, City of New York, N. Y.

Order Settling Bill of Exceptions.

Bill allowed as amended and ordered on file, October 9, 1917.

J. M. MAYER,

D. J.

365 *Stipulation.*

United States District Court, Southern District of New York.

L16—175.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Siegmund Lubin, William N. Selig, George K. Spoor, Percival L. Waters, William Pelzer, Defendants.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that inasmuch as the answers of all of the defendants, with the exception of the defendant Percival L. Waters, are similar in every respect, that the answer of the defendant Pathe Freres be printed in the record on appeal, and that the answer of the said defendant Pathe Freres shall be printed as the answer of the defendants Motion Picture Patents Company, Thomas

366 A. Edison, Inc., Kalem Company, Vitagraph Company of America, Biograph Company, Lubin Manufacturing Company, Gaston Melies, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Sigmund Lubin, William N. Selig, George K. Spoor,

upon condition that a copy of this stipulation be incorporated in the record on appeal.

Dated, New York, December 1st, 1917.

ROGERS & ROGERS,
Attorneys for Plaintiff.
CHARLES F. KINGSLEY,
Attorney for Defts. Harry N. Marvin, Motion Picture Patents Co., Biograph Co., Jeremiah J. Kennedy.
GEORGE F. SCULL,
Attorney for Defts. Thomas A. Edison Inc., William Pelzer, Kalem Company and Frank L. Dyer.
SEABURY, MASSEY & LOWE,
Attorneys for Defts. Albert E. Smith and Vitagraph Co. of America.
By E. D. D.
COUDERT BROTHERS,
Attorneys for Defts. Pathe Freres and Jacques A. Berst.
DWIGHT MACDONALD,
Attorney for Defendant, Percival L. Waters.

367 United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Brest, Albert E. Smith, Percival Waters, Defendants.

Assignment of Errors.

Now comes the plaintiff, Joseph H. Sampliner, by Rogers & Rogers, his attorneys, and with his petition for a Writ of Error, files the following assignments of error upon which he will rely in the prosecution of the Writ of Error in the above cause.

1. That the Court erred in granting the motion of the defendants in error to strike from the case the following defendants, and to which plaintiff duly excepted; viz:

Lubin Manufacturing Company, George Kleine, Essanay Film Manufacturing Company, Selig Polyscope Company, Siegmund Lubin, William N. Selig, George K. Spoor, because of the said
368 defendants not having been served; as the Court was only trying one of the issues of the case the plaintiff could have served these defendants before the other issues in the case were tried.

2. That the Court erred in excluding the assignment offered by the plaintiff in error, plaintiff below, at the time and at the place in

the record when it was first offered in evidence by the plaintiff to which plaintiff duly excepted as appears by the record and Bill of Exceptions, as follows:

"Mr. Rogers: I offer the paper in evidence.

Mr. Seabury: The defendants object to the introduction of this paper in evidence, if your Honor please, on the ground that there is no authority shown, as yet, on the part of those who were assumed to execute this paper to act on behalf of the Lake Shore Film & Supply Company; and further, on the ground that there is no proof yet to show that any alleged services rendered by Sampliner to this Company were a valid consideration for this assignment.

I do not want to digress if your Honor pleases——

The Court: I will sustain the objection.

Mr. Rogers: I respectfully except."

The said assignment is dated the 28th day of December, 1911, made by the Lake Shore Film & Supply Company to the plaintiff in error, plaintiff below, which assignment assigned the cause
369 of action that the Lake Shore Film & Supply Company had against the defendants in error, defendants below, as follows:

Cleveland, Ohio, December 28th, 1911.

"For value received, The Lake Shore Film & Supply Company, a corporation organized and doing business in and under the laws of the State of Ohio, with its principal office at Cleveland, Ohio, hereby sells, assigns and transfers to J. H. Sampliner, all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement, by and between The Motion Picture Patents Company, The Edison Manufacturing Company, The Essanay Film Manufacturing Company, The Kalem Company, George Kleine, The Lubin Manufacturing Company, Pathe Freres, The Selig Polyscope Company, The Vitagraph Company, The Melies Manufacturing Company and the General Film Company, all of said parties having conspired together for the purpose of ruining and destroying the business of The Lake Shore Film & Supply Company and contary to and in violation of the Sherman Anti-Trust Act, commonly known as the Sherman Law.

In witness whereof, the said The Lake Shore Film & Supply Company has caused these presents to be signed by its President, duly authorized thereunto and has caused its corporate seal
370 to be attached the day and year first above written.

THE LAKE SHORE FILM & SUPPLY COMPANY.

By (Signed) E. MANDELBAUM,

[CORPORATE SEAL] *President.*

(Signed) W. A. SHERMAN,

Sec."

3. That the Court erred in directing the plaintiff in error, the plaintiff below, to show authority for calling a special meeting of the board of directors of the Lake Shore Company, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"The Court: Very well, then, you will have to show authority for calling that special meeting.

Mr. Rogers: I respectfully except."

The plaintiff in error, the plaintiff below, should not have been put to proof of authority for calling a special meeting, inasmuch as the assignment from the Lake Shore Film & Supply Company to the plaintiff in error, the plaintiff below, was duly executed by the authorized officers, and the seal of the Lake Shore Film & Supply Company properly affixed thereto; that the assignment was not subject to collateral attack, and the defendants, not being directors or stockholders of the corporation, could not question the regularity of the meeting at which the action authorizing the assignment was taken.

4. That the Court erred in ruling that it was not bound to follow the relevant local law, in this instance the Ohio law, the place
371 where the transaction took place, or the New York law, where the trial forum is laid, to which the plaintiff duly excepted, as appears by the record and Bill of Exceptions.

5. That the Court erred in ruling that the law of this case is that the plaintiff must show what it was of value he gave to the plaintiff's assignor before the assignment would be received in evidence, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions.

6. That the Court erred in excluding the assignment offered by the plaintiff in error, plaintiff below, dated the 28th day of December, 1911, executed by the Lake Shore Film & Supply Company to the plaintiff in error, and the substance of which is set forth in full in the preceding assignment (designated No. 2), at the time and place in the record at which it was offered in the record and excluded under the ruling of the Court, to which plaintiff duly excepted as appears by the record and Bill of Exceptions, which reads substantially as follows:

"Now, where an attorney takes an assignment of a cause of action under this statute so far as this Court is concerned, he must show affirmatively what it is of value that he has given for that cause of action. The rule is that the Federal Courts must follow the relevant local law so far as possible, or words to that effect; it places the duty on the Federal courts as near as may be of following the local law, whether in this instance it be the Ohio law, the place where the transaction took place, or the New York law where the trial
372 forum is laid. But that provision does not command the Federal courts to release their own judgment as to what the law is that they will apply in respect of the Federal statute in a Federal jurisdiction. The law of this case, for the time being, is

that the plaintiff must show what is was of value he gave to this Company, this plaintiff's assignor, and until he does, I shall not receive the paper in evidence.

The objection is sustained, and you may have an exception.

Mr. Rogers: I take an exception."

7. That the Court erred in overruling plaintiff's objection to the questions propounded by the Court, as to whether the plaintiff's assignor had received a bill for services from the plaintiff before the time of the assignment, or a communication from him about his services, from the standpoint of demanding payment, or in respect of any claim for legal services, and in eliciting the testimony over the objection and exception of plaintiff's counsel, to which the plaintiff's duly excepted, as appears from the record and Bill of Exceptions, as follows:

"By the Court:

Q. Now, was Mr. Sampliner present?

A. At that meeting?

Q. Yes.

A. No, sir.

Q. Had you received a bill up to that time from him?

A. No, sir.

Q. Had you received any communications from him about his services, from the standpoint of demanding payment?

A. Why, he had stated——

Q. No, no, a communication means written?

Q. No, no, a communication means writing?

Mr. Rogers: Pardon me, may I preserve the same objecton and exception to this entire line, on the ground it is incompetent, irrelevant and immaterial.

The Court: Yes.

A. No, sir, not that I remember.

Q. You had not?

A. No, sir.

Q. You had received no letter or paper writing of any kind from him?

A. Not in connection with this matter, no, sir.

Q. Not in connection with this matter?

A. Well, the matter of our cancellation of our license.

Q. I am talking about this? I am talking of a paper which has been marked Plaintiff's Exhibit 1 for identification: you see that paper?

A. Yes, sir. We had been informed——

Q. Wait a moment, follow my question. Prior to the execution of that paper, had you *had* received any communication from Mr. Sampliner—don't give me the details, just say yes or no—in respect of any legal claim for legal services?

A. Yes, sir.

Q. Where is it, and when I say communication I mean a written communication?

A. No, sir.
Q. You have one?
A. No, sir.

8. That the Court erred in excluding the assignment offered by the plaintiff in error, dated the 28th of December, 1911 (de-
374 scribed and fully set forth in the preceding assignment designated "2"), and when it had been shown that the assignment was executed after the adoption of a resolution at a meeting at which all of the directors, who comprised all of the stockholders of the corporation, were present and authorized it and in sustaining the objection of the defendants to the introduction of the paper at that time on the grounds assigned at the time when the paper was offered, and to which plaintiff duly excepted as appears by the record and Bill of Exceptions, as follows:

"Mr. Rogers: I offer in evidence this paper, Plaintiff's Exhibit 1, for identification.

Mr. Seabury: Same objection.

The Court: Objection sustained on the ground heretofore stated.

Mr. Rogers: I except."

9. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the questions asked of the witness, William A. Sherman, by the Court, and in eliciting the testimony as to whether the witness or the plaintiff's assignor had any advice from the plaintiff whether they had a case against the defendants and as to whether plaintiff's assignor had any advice from plaintiff, orally or by written communication as to whether plaintiff's assignor, The Lake Shore Film & Supply Company, had a cause of action against any of the persons or corporations referred to as the "Motion Picture Trust," or whether there had been communication upon that subject from the plaintiff to the board of directors or to any one of them.

375 As to whether plaintiff's assignor had been advised by the plaintiff, or as to whether the committee appointed to interview the plaintiff reported that the plaintiff had advised what damages, if any, the plaintiff's assignor would be entitled to;

As to whether anything was said as to the amount of damages that the plaintiff's assignor might be entitled to recover as against the "Motion Picture Trust";

As to whether at the meeting at which the resolution was adopted authorizing the assignment to the plaintiff there was discussion as to plaintiff's assignor having a cause of action against the so-called "Motion Picture Trust";

As to whether any body said at the meeting that the plaintiff's assignor was advised by the plaintiff that it had a case against the "Motion Picture Trust";

As to whether Mr. Mandelbaum and Mr. Schachtel informed the board of directors at the meeting at which the resolution was adopted authorizing the assignment to plaintiff, that the plaintiff had advised that the Lake Shore Film & Supply Company had a cause of action against the so-called "Motion Picture Trust"; to all of which com-

sel for the plaintiff objected and excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. Had you been advised that there was a cause of action?
A. Not at that time when we took the matter up; up to that time, no, sir.
376 Q. I mean when you executed this paper to Sampliner had Sampliner told you you had a case against the so-called Motion Picture Trust?
A. Not to me personally.
Q. Well, I mean——
A. But from the fact——
Q. Was any such thing stated at the meeting?
A. No, sir, we all presumed that we had.

The Court: Strike that out.

Q. Was it stated in your presence by Mr. Sampliner or by anybody at that directors' meeting that the Lake Shore Film Company had a cause of action?
A. No, sir.
Q. Against these various defendants you have designated as the Motion Picture Trust?
A. No, sir.
Q. At that time you didn't know that from any advice of your attorney, whether you had a case or not?

Mr. Rogers: May I ask whether he knows personally?
Mr. Seabury: Please, I think he shouldn't interrupt in putting that question.
The Court: You may reserve anything you have in mind.
Mr. Rogers: May I have an exception, your Honor, to the form of the question as to its competency, relevancy and materiality?
The Court: Yes.
Mr. Rogers: And I except.

Q. At that time you didn't know?
A. No, sir.
377 Q. So far as you were informed, had the board of directors been informed as to whether or not the Lake Shore Company had a cause of action against any of these persons or corporations which you have called the Motion Picture Trust?
A. Well, as far as myself is concerned I thought we had.
Q. I don't want your thought, I want what was said?
A. I don't remember whether anything was said now or not.
Q. You have no recollection?
A. No recollection now.
Q. Did you ever have a written communication from Mr. Sampliner on the subject, and by you I mean either you or the board of directors or any of them that you know of?
A. I think we did.

Mr. Seabury: I move to strike that out, your Honor.
The Court: Yes, strike it out.

Q. Can you say whether you did or not?

A. No, sir, I can't.

Q. Up to that time had Mr. Sampliner, so far as you know, indicated to the board of directors of this Lake Shore Film Company what his services were worth?

A. At that time that——

Q. Prior to this occasion?

A. Prior to this assignment he had stated to the committee, or Mr. Mandelbaum and Mr. Schachtel who were authorized to see him in regard to our claim what the account was.

Q. You don't understand, you have told us that; you have told us that a committee was appointed to see Mr. Sampliner, and
378 that committee was Mr. Schachtel and Mr. Mandelbaum, and you have testified that Mr. Sampliner and Mr. Schachtel were to come back and make a report; and you have told us about that?

A. Yes, sir.

Q. Eliminate that from your mind. My question is whether prior to that time you had received any bill from Mr. Sampliner, and by you I am always referring to the corporation?

A. No, sir.

Q. Prior to that time had the corporation been informed by Mr. Sampliner, so far as you know, of any claim for services?

A. Not in connection with this matter.

Q. That is what I mean?

A. Not in connection with this matter, no, sir.

Q. Was he your attorney in some other matters?

A. Yes, sir.

Q. And in regard to these matters did he render bills?

A. Yes, sir.

Q. And those bills were paid?

A. Yes, sir.

Q. But they were unrelated to this matter?

A. Yes, sir, petty bills.

Q. So, as I understand it, so far as this matter was concerned, up to the time that Schachtel and Mandelbaum reported, you had received no bill or demand, orally or in writing, for any legal service in this connection from Mr. Sampliner?

A. No, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. Now at this meeting at which Plaintiff's Exhibit 1 for identification was discussed, had you been advised by Mr. Sampliner, or did the committee report that he had advised as to what damages, if any, you would be entitled to?

A. No, sir.

379 Q. So at that time I assume you didn't know whether your damage would be a dollar or a million?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Mr. Rogers: When you say you didn't know, you are referring to yourself?

The Witness: Yes, sir, I am referring to myself in that.

Q. I am referring now not merely to your own personal knowledge but as to whether or no anything was said at this directors meeting on the subject?

A. As to damages, no, sir, nothing was said.

Q. Nothing was said?

A. No, sir, as to the amount of damages we might get or might not.

Q. Nothing said at all, is that right?

A. Yes, sir.

Q. Were you advised that you had any case against the Motion Picture Trust, so-called?

Mr. Rogers: Your Honor, in order that the record may be preserved, I understand that all these questions are considered formally objected to on all the grounds, and I have a formal exception. My theory is that——

The Court: Certainly, I am quite indifferent as to whether you have a formal exception or a real exception.

Mr. Rogers: I mean exception.

Mr. Seabury: I don't object to his exception, but I object to his stating what his real theory is.

Mr. Rogers: I didn't say real theory, I said because my theory——

Mr. Seabury: I object to the theory, we want the facts.

The Court: You may have an exception to each and every question asked by me.

Mr. Rogers: Without stating the grounds?

The Court: Yes, until I notify you to call special matters to my attention, and you may have an exception to my ruling.

Q. At the time of this meeting, I repeat, was anything said by anybody as to whether or not you did have a case, putting the matter in popular language against the so-called Motion Picture Trust?

A. We discussed that matter a number of times.

Q. No, no, the point is, at that meeting, did any one say that you were advised by Mr. Sampliner that you had a case against the Motion Picture Trust?

The Witness: I think that was discussed, that we had a case against the Motion Picture Trust, but we had no funds to prosecute.

Q. You haven't answered my question. Did Mr. Mandelbaum and Mr. Schachtel inform the board of directors on that occasion whether Mr. Sampliner had advised that the Lake Shore Company had a cause of action against the so-called Motion Picture Trust?

A. Yes, I think a statement was made that we had a good case against the Motion Picture Trust?

Q. Is that all that was said on the subject?

A. As far as that is concerned, yes—I mean the resolution at that time was to the effect that we assign the claim to J. H. Sampliner and it was accepted."

10. That the Court erred in overruling the objection of counsel for the plaintiff in error, to the questions asked of the witness, William A. Sherman, or in eliciting over the plaintiff's objection and exception, the testimony as to whether plaintiff prior to the assignment to him, or up to the time of the assignment, or the meeting at which the same was discussed, had sent a bill or made a demand orally, or in writing, for payment of services in connection with the matter for which the assignment was made, and as to whether the plaintiff prior to the assignment to him had indicated to the board of directors or the plaintiff's assignor, what his services were worth, or that he had any claim for services, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Up to that time had Mr. Sampliner, so far as you know, indicated to the board of directors of this Lake Shore Film Company what his services were worth?

A. At that time that——

Q. Prior to this occasion?

A. Prior to this assignment, he had stated to the committee, or Mr. Mandelbaum and Mr. Schachtel who were authorized to see him in regard to our claim what the account was. * * *

Q. Eliminate that from your mind. My question is, whether prior to that time you had received any bill from Mr. Sampliner and by you I am always referring to the corporation?

382

A. No, sir.

Q. Prior to that time had the corporation been informed by Mr. Sampliner, so far as you know, of any claim for services?

A. Not in connection with that matter, no.

Q. That is what I mean?

A. Not in connection with this matter, no.

Q. So as I understand it, so far as this matter was concerned, up to the time that Schachtel and Mandelbaum reported you had received no bill or demand orally or in writing for any legal services in this connection from Mr. Sampliner?

A. No, sir. * * *

Q. Were you advised that you had any case against the Motion Picture Trust, so-called?

Mr. Rogers: Your Honor, in order that the record may be preserved, I understand that all these questions are considered formally objected to on all the grounds, and I have a formal exception. My theory is that * * *

The Court: You may have an objection to each and every question asked by me.

Mr. Rogers: Without stating the grounds?

The Court: Yes, until I notify you to call special matters to my attention, you may have an exception to my ruling.

11. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the questions asked of

the witness, William A. Sherman, by the Court, and in eliciting over plaintiff's objection and exception, the testimony as to whether the plaintiff's assignor or the committee appointed to interview the plaintiff had been advised, or whether there was any discussion at the meeting at which the resolution was adopted at which the assignment was authorized, as to what damages and the amount of damages that the plaintiff's assignor would be entitled to, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. Now at this meeting at which plaintiff's Exhibit 1 for identification, which was discussed, had you been advised by Mr. Sampliner, or did the committee report that he had advised as to what damages, if any, you would be entitled to?

A. No, sir.

Q. So at that time I assume you didn't know whether your damages would be a dollar or a million?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Mr. Rogers: When you say you didn't know, you are referring to yourself?

The Witness: Yes, sir, I am referring to myself in that.

Q. I am referring now not merely to your own personal knowledge, but as to whether or no anything was said at this directors meeting on the subject?

A. As to damages, no, sir, nothing was said.

Q. Nothing was said?

A. No, sir, as to the amount of damages we might get or might not.

Q. Nothing was said at all, is that right?

A. Yes, sir.

Q. Were you advised you had any case against the Motion Picture Trust, so-called?

Mr. Rogers: Your Honor, in order that the record may be preserved, I understand that all these questions are considered formally objected to on all the grounds, and I have a formal exception. My theory is * * *

The Court: You may have an objection to each and every question asked by me * * * and you may have an exception to my ruling.

12. That the Court erred in excluding the assignment offered by the plaintiff in error (fully described and set forth in the preceding assignment designated "2") at the time when it was offered, and after it had been shown that it was authorized by resolution at a meeting at which every director and stockholder was present, comprising the entire one hundred per cent. of the stockholders of the company and all of the five directors of the corporation, and after it had been shown that the assignment was made to the plaintiff in consideration of past services rendered; and which was excluded by

the Court under the following offer, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions.

"Mr. Rogers: I now offer in evidence plaintiff's Exhibit 1 for identification.

Mr. Seabury: We make the same objection, and I urge this consideration additionally, that even if it were taken for services actually rendered, which does not now appear, because he says it was
385 for services to be rendered as well, it appears that his particular purpose in taking it was to bring suit upon it, and I infer——

The Court: I will sustain the objection at this time. You may have an exception, and you may offer it again during Mr. Sampliner's testimony as you may be advised.

Mr. Rogers: * * *

The Court: * * *

Mr. Rogers: I have an exception to the refusal to admit the paper at this time."

13. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the questions asked by counsel for the defendants in error, defendants below, of the witness William A. Sherman, and eliciting the testimony as to the declaration of a dividend by the plaintiff's assignor, duly objected and excepted to by the plaintiff, as appears by the record and Bill of Exceptions, as follows:

"Q. Now, changing the date, 1911, I ask you if you did not declare a dividend in May, 1911, of $10,000?

Objected to. Objection overruled. Exception.

A. Not $10,000. We never declared a dividend of 100 per cent.

Q. I call your attention to an entry on the minute book on page 37 signed somebody Sherman Secretary. Is that your signature?

A. Yes, sir.

Q. Don't you find entered there the fact that you declared a dividend of $10,000?

386 Mr. Rogers: I object on the ground that this is collateral matter. He is making this witness his own witness, and on the ground that the book is the best evidence, but I claim that this is immaterial.

The Court: It is collateral, but it is to test the witness' memory. The objection is overruled.

Q. You find that to be true, do you not?

A. Yes, sir."

14. That the Court erred in overruling the objection of counsel for the plaintiff in error to the questions asked of the witness, William A. Sherman, and eliciting the testimony, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. You find at the same date there is an entry of a sale by the company of its Columbus, Ohio, branch, don't you?
A. Yes, sir.
Q. From which the company realized $9,000?

Mr. Rogers: Objected to on the same grounds.
Objection overruled. Exception.

A. Yes, sir."

That the grounds that were assigned in support of the objection as contained in the previous question and stated to be that it is collateral matter and immaterial, on the ground that the examining counsel had made the witness his own witness, and that the book could be the best evidence.

15. That the Court erred in overruling the objection of
87 counsel for the plaintiff in error, plaintiff below, to the question asked of the witness, William A. Sherman, by counsel for the defendants in error, defendants below, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. And yet the entry of the assignment by this Company of its claim against what you call the Motion Picture Trust, was not of sufficient importance to enter into the book?
A. Yes, sir, it was important.
Q. Well, you had the book?

Mr. Rogers: I object on the ground that the witness testified Saturday that he has written this out and that it was in the book in that form, but he had not transferred it and it is now missing.
Objection overruled. Exception.

Q. You had the book in your possession from December 28th to March 12th, didn't you?
A. Yes, sir."

16. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the question asked of the witness, William A. Sherman, by counsel for the defendants in error, defendants below, and eliciting the testimony, to which plaintiff duly objected, as appears by the record and Bill of Exceptions, as follows:

"Q. And the resolution that you have described, namely, Resolved that we assign to Mr. Sampliner our claim against the Motion Picture Trust, that was passed, and you did not in the three months that elapsed, nearly, have time to enter that upon the book?

88 Mr. Rogers: Objected to as immaterial.
Objection overruled. Exception.

Q. You had not had time to do that?
A. I may have had time, but I didn't do it.

Q. You might have had time. You weren't so busy you could not have written those four or five lines, were you?
A. I might have."

17. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the questions asked by counsel for the defendants in error, defendants below, of the witness, William A. Sherman, and eliciting the testimony to which plaintiff duly excepted as appears by the record and the Bill of Exceptions, as follows:

"Q. You entered in the Minute Book on page 34, the resolution imposing in Mr. Mandelbaum authority to carry out the sale of the Columbus, Ohio, branch, which resulted in getting $9,000 didn't you?"

The testimony having been admitted over the objection and exception of plaintiff's counsel, as appears from the record and Bill of Exceptions, under the following discussion between the Court and counsel:

"Mr. Rogers: I object upon the ground that if the evidence is admissible that the book itself ought to go in evidence. The gist of my objection is that it is entirely immaterial.
The Court: I will allow it on the question of credibility.
Mr. Rogers: It is a method of getting into the record by
389 parol immaterial testimony.
The Court: The objection is overruled.
Mr. Rogers: An exception.
Mr. McCarter: If I can offer the book on cross-examination we are quite ready to do so. I had supposed that was not proper practice.
The Court: So had I.
Mr. Rogers: Are you sincere about that?
Mr. McCarter: I offer the book in evidence.
The Court: If there is no objection I will receive it.
Mr. Rogers: I am not objecting to the book going in, but may I preserve my rights that if the evidence is admissible then I have no objection to the book being received, but I want to preserve my objection that the contents of the book and the matters inquired about are incompetent, irrelevant and immaterial to the issues we are trying here.

18. That the Court erred in ruling that as a matter of law that testimony as to all of the surrounding circumstances attendant upon the execution of the assignment was admissible because of the condition of the assignment, there being no acknowledgment thereon (presumably by an officer authorized to take acknowledgments), and because of the absence thereof there was nothing to indicate authority, and irrespective of the technique of the assignment, that testimony to show what the situation was; what it was that
390 was assigned and under what circumstances it was assigned was admissible and could be developed by defendants' counsel

on cross-examination of the plaintiff's witness Sherman, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions. Previous to the ruling announced by the Court objection and exception was duly taken to this line of testimony as being incompetent, irrelevant and immaterial, and subsequent to the ruling, the Court admitted the testimony over plaintiff's objection, to which exception was duly taken by the plaintiff in line with the ruling made.

The Court: I cannot take a qualified concession. The cross-examination is based upon a perfectly simple principle of law. The witness says that a certain meeting took place at a time which he is unable definitely to fix and that certain matters took place at that meeting. Now it is perfectly competent for counsel to cross-examine for the purpose of testing his memory, and in that connection call his attention to other relevant things. Counsel would have no right over objection to introduce the book. He has the right to ask anything relevant tending to test the memory of the witness. I am willing to let the book in if the concession is unqualified, but if surrounded with conditions I will not permit it.

Mr. Rogers: In view of the fact that there has been some merriment at the counsel table on the other side, and so that the jury will not misunderstand my position, may I say this to your Honor: Our contention is now and has been that it is perfectly immaterial so far as this assignment goes what took place at that particular meeting or at any meeting. That the assignment itself upon the face of it purports to be the act of the corporation and is binding upon these defendants. Now if I unqualifiedly permit the book to go in evidence without reserving that objection I may be deemed to waive my point. With that understanding I am willing that the book should go in evidence, but I want to preserve that objection, and I submit, your Honor, I have a right to do that.

391

The Court: There is no question about your right to preserve any right that you have. I decline to permit the book unless the concession is absolute. And with respect to your suggestion as to the assignment, unless it be—I am not at all clear that that is so—that the seal operates as a self-proving means there is no proof of the execution of this assignment. There is no acknowledgment, there is nothing to indicate authority. It is a piece of paper signed by Mandelbaum and somebody else; that is all it is, who purport or say they are officers. In the condition in which that assignment is I am taking all the testimony to show all the surrounding circumstances. Further than that, quite irrespective of the technique of the assignment, I am taking the testimony to show what was the situation, what was it that was assigned, and under what circumstances was it assigned, and lastly was it assigned in point of fact. Now you may have an objection and exception to my rulings as we go along.

Mr. Rogers: I submit that a man who was present at the meeting testified to that.

392

The Court: He does not testify to that.

Mr. Rogers: He executed it as the secretary of the corporation.

The Court: I am not going to be technical about that because I

am more concerned about the more important fundamental question in the case.

Mr. Rogers: I do not want to create the impression that I am trying to keep any testimony out of the case which the jury should have legally, and I would like to have your Honor instruct the jury that I am within my rights when I preserve my objection that nothing that is in that minute book is pertinent here.

The Court: You are within your rights.

Mr. McCarter: The book is neither in nor out.

The Court: The book is out until the concession is absolute."

19. The Court erred in overruling the objections of the counsel for plaintiff in error, and in admitting testimony under the general ruling and exception, tending to show or to develop the damages or the amount of damages claimed or recoverable, and as to the knowledge on the part of the plaintiff's assignor or its officers of the extent of their claim, or the amount of damages that might be awarded, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. Have you learned since you were in New York, coming here on purpose to testify in this case, that Mr. Sampliner states
393 in his complaint that the Company of which you were secretary suffered an actual loss of $250,000, and that under the Sherman Law he was entitled to claim three times that or $750,000?

A. No, sir.

Mr. Rogers: Objected to as immaterial and incompetent.

Objection overruled. Exception.

Q. You say no to that?

A. Yes, sir.

Q. When did you first learn of the extent of Mr. Sampliner's claim?

A. This is the first time I have heard of any $750,000——

Mr. Rogers: Wait. I object upon the same grounds.

The Court: The same ruling.

Exception.

Q. When did you first learn——

A. About this $750,000?

Q. Or the $250,000, either one?

A. When the figures were mentioned in court here Friday.

Q. You prior to that time during the time negotiations were going on or during the time that you were having these conferences or meetings when the subject of assigning to Mr. Sampliner was brought up had no interest in knowing what the extent of your claim was?

Same objection. Same ruling. Exception.

Q. (Last question read.)

A. No, sir, I had no interest in that whatever."

20. That the Court erred in overruling the objections of
394 counsel for plaintiff to the questions asked the witness, William A. Sherman, by counsel for the defendants as to the

advice, if any, given by the plaintiff to plaintiff's assignor or to the witness Sherman, as to the amount of the plaintiff's assignor's claim against the defendants or the extent thereof to which the plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. What advice did he give you about it?
A. That we had a good claim.
Q. A good claim?
A. Yes, sir.
Q. For how much?

Mr. Rogers: Objected to as immaterial.
Objection overruled. Exception.

A. For how much?
Q. Yes.
A. He could not tell, nor could any one tell at the time.
Q. Did he tell you that the claim was supposed to be the injury you had suffered?

Mr. Rogers: I object on the ground that this is immaterial.
Objection overruled. Exception.

Q. (Last question read.)

The Court: "You" means the company.
The Witness: Yes, sir.

Q. But no one could tell what that amounted to among you, could you?
A. Yes, sir, I could tell.
Q. You could tell?
A. Yes.
Q. From the books?
A. From the books."

21. That the Court erred in overruling the objection of counsel for the plintiff in error to the questions propounded and the testimony elicited over objection and exception, as to the figures
395 that were made up as to the injury that was done to the plaintiff's assignor by the defendants, and as to the period of time when the figures showing such injury were made, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. Did you at any time figure upon your books what injury if any was done to your Company?
A. Yes, sir, I did.
Q. And did you give that to Mr. Sampliner?
A. Yes, sir.

By Mr. McCarter:

Q. When did you make that figuring up?

Mr. Rogers: Objected to as immaterial and incompetent.

Objection overruled. Exception."

22. That the Court erred in eliciting the testimony from the witness Sherman and in overruling the objection of counsel for the plaintiff to the questions asked by the Court as to when the figures were made up, showing the extent of the plaintiff's assignor's injury or damages, and as to the knowledge of the plaintiff's assignor, or the witness Sherman had of the extent of the plaintiff's assignor's damages at the time when the assignment was executed, to all of which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. When did you make that and give it to Mr. Sampliner?

A. I don't remember just when it was. It was sometime after the assignment. I started in with the bookkeeper to help first to compile the figures in the book.

396 Q. Was it before you ceased connection with the Company?

A. Yes, sir.

Q. Well, when was it?

A. It must have been—I think I started in in January or February, 1912, and compiled the figures if I am not mistaken.

Q. Then, if I understand you correctly, at the time this paper was delivered, December 28th, you didn't know what the damage was?

A. No, sir.

Q. Did any one else connected with the Company so far as you know?

Mr. Rogers: May I object to your Honor's question on the same ground and have an exception?

The Court: Certainly.

Q. What is the answer? On the 28th day of December, 1911, Plaintiff's Exhibit 1 purports to be executed. That is the paper you executed with Mr. Mandelbaum. At that time did you or so far as you know, any member of the board of directors of the company, know what the damage to the company was?

A. Yes, sir, I knew. I could not state just when I started in on compiling those figures.

Q. You say you knew what the damage was?

A. I had figured it up, yes, sir.

Q. Before this assignment was executed?

A. I cannot say whether it was before or after, now.

Q. You just said a few moments ago it was January and February?

A. I think it was January and February after the assignment that I started in, but I am not positive.

397 Q. Did it take you a long while to do that?

A. I took three or four days.

Q. Three or four days?

A. I say days, evenings.

Q. Are you willing to state that you knew what the damage was when this was executed?

Same objection; ruling and exception.

A. The assignment was executed in December, and it was in January or February, I think I started in.
Q. So you didn't know what your damage was when the assignment was executed?
A. In actual dollars and cents I did not.
Q. That is what I am talking about?
A. No, sir.
Q. You considered that you were damaged?
A. Yes, sir.
Q. But you hadn't made any calculations to find out the amount of the damage at the time the assignment was made?
A. No, sir."

23. That the Court erred in excluding upon objection of the defendants' counsel the deposition of the witness, William A. Sherman, taken at Cleveland, Ohio (Plaintiff's Exhibit 4 for identification), after defendants' counsel had, over objection and exception of the plaintiff's counsel, interrogated him as to portions of the testimony given by him in that deposition, and despite objection of counsel for the plaintiff at the time, that the entire deposition of the witness should be put in evidence if any part of it was to be read in the examination or cross-examination by the defendants, to all of which plaintiff duly excepted, as appears from the record and
398 Bill of Exceptions, as follows:

"Q. Did you make those answers in reply to those questions?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial; if any part of the deposition is read the whole of the deposition should be read. I have no objection to the entire deposition being put in evidence.

Overruled. Exception.

The Court: You may answer, did you make those answers?
The Witness: Yes, sir.

Q. The answer is yes?
A. Yes, sir.

Mr. McCarter: That is all.

Mr. Rogers: May I offer the whole of the deposition in evidence so that the Court and jury may have it and the entire story as told by the witness the other day?
Mr. Seabury: I object.
The Court: Objection sustained.
Mr. Rogers: I except. May I have this deposition marked for identification?
The Court: Certainly, the clerk will mark it.
Marked Plaintiff's Exhibit 4 for Identification."

24. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the question asked of the witness, William A. Sherman, by counsel for the defendants
399 in error, defendants below, to which plaintiff duly excepted, as appears from the record and Bill of Exceptions, as follows:

"Q. Now I ask you why you didn't include in that resolution a statement that Mr. Sampliner was not only to get this assignment for the services he rendered, but was also to render further services?

Mr. Rogers: I object to that on the ground it is argumentative, and on the ground it is incompetent.

The Court: Overruled.

Mr. Rogers: And immaterial.

The Court: Overruled.

Mr. Rogers: I except.

The Court: You may answer. He wants to know, when you offered that resolution, why you didn't include in the resolution a provision as to future services of Mr. Sampliner?

The Witness: I think that was included; I made the resolution that we assign the claim to J. H. Sampliner for services rendered and for protection in the future, as far as the trust was concerned."

25. That the Court erred in overruling the objection of counsel for the plaintiff in error, plaintiff below, to the question asked of the witness, William A. Sherman, by counsel for the defendants in error, defendants below, to which plaintiff duly excepted, as appears from the record and Bill of Exceptions, as follows:

"Q. And when Mr. Sampliner undertook to take the assignment which you state you had not the money to pay the lawsuit expenses for, he was to pay these expenses and undertake all that work, was he not?

400 Mr. Rogers: I object to that on the ground it is immaterial and incompetent.

The Court: Overruled.

Mr. Rogers: I also object to the question on the ground that it is a collateral matter, and I submit that Mr. McCarter must treat this witness as his own witness on that branch.

Overruled. Exception.

The Court: Instead of saying he was, you can say was Sampliner to pay those expenses.

The Witness: If he hadn't accepted our proposition and we engaged him, we would have had to pay, but having accepted our claim, that ended it as far as the Lake Shore Film Company was concerned, in regard to paying; we had no claim then, we had nothing to do with the claim after that date—he was to pay all his own expenses, it was nothing to us."

26. That the Court erred in excluding at the time when it was offered the assignment from plaintiff's assignor to the plaintiff, then known as "Plaintiff's Exhibit 1 for Identification," and described and

set forth in full in the preceding assignment designated "2," after testimony had been offered that the assignment had been authorized at a meeting of all the directors, and that it was executed pursuant to authorization conferred upon the President and the Secretary, and for past services or indebtedness due from the plaintiff's assignor to the plaintiff, and particularly in view of the concession by the defendants that they had no testimony to show that the
401 plaintiff did not render the services for which the assignment was made, to all of which plaintiff excepted, as appears from the record and Bill of Exceptions, as follows:

"By the Court:

Q. You consulted with him a good many times and it was all about this motion picture business?

A. Yes, sir.

Q. And you advised with him as a lawyer, advising as to the Lake Shore Film Company in connection with what you regarded certain acts of the defendants?

A. Yes, sir.

Q. And that ran over how long a period?

A. A little over a year I should judge.

Q. Ending about when do you think?

A. Either probably, October or November of the following year.

Q. That would be what year?

A. 1911.

The Court: That is all you need on that point. I will ask counsel for the defendant. You have no testimony to show that he did not render services?

Mr. Seabury: We have no testimony to show that he did not render services and not knowing we cannot say anything as to their value.

The Court: You have no testimony in contradiction of this?

Mr. Seabury: No testimony as to services rendered or as to the value of services, we know nothing about them.

Mr. Rogers: I offer in evidence Plaintiff's Exhibit 1 for Identification.

The Court: I must exclude it for the present. Ask him what took place at the meeting?

402 Mr. Rogers: May I have an exception?

The Court: Certainly, that is one of the things you can always have in this Court."

27. That the Court erred in allowing testimony over the objection of the counsel for plaintiff and in overruling his objection to the questions by which it was sought to show that there had been discussion between the plaintiff and plaintiff's assignor, or its officers, as to what the approximate cost of a suit would be in the event action was brought by the plaintiff's assignor, against the defendants upon the claim assigned, to all of which plaintiff excepted, as appears from the record and Bill of Exceptions, as follows:

"Q. Was the expense of the possible suit against the Patents Company spoken of?

A. Yes, sir.

Q. How much did he say that was?

A. Approximately $10,000.

Mr. Rogers: I object to that as incompetent, irrelevant and immaterial, preserving my objection and exception.

The Court: Overruled. Exception.

Q. Did you tell him you hadn't any such money as that in the treasury?

A. I told him we didn't think we had enough money, that the company couldn't afford to prosecute the case.

Q. Did he then suggest that he would?

A. No, sir.

Q. He said he would reflect upon it?

A. Yes, sir.

Q. Did he report to you later?

A. He did.

403 Q. And at this later time he reported to you that if your company would assign to him this claim you had against the Patents Company, that he would release his bill, that he would bear the expense of the fight, and he would also take care of you in any further litigation arising out of the matter, did he not?

A. There was nothing said about the expense of fight, simply the matter that we assign the claim to him and he would discharge his bill against us."

28. That the Court erred in admitting the testimony and overruling the objection of counsel for the plaintiff to the question propounded by counsel for the defendants to the witness Mandelbaum with respect to the discussion or report by him to the directors of the plaintiff's assignor as to the expense to the plaintiff's assignor in prosecuting the claim against the defendants and the willingness on the part of the plaintiff to take an assignment of the cause of action against the defendants, and himself bear the expense of a suit upon the assigned claim, to which plaintiff duly excepted, as appears from the record and Bill of Exceptions, as follows:

"Q. Who was to bear the expense of this claim?

Mr. Rogers: I object to that on the ground that it is purely argumentative.

The Court: The question may be amended. Was anything said as to who was to bear the expense of the claim?

Mr. Rogers: Well, he has already said that there wasn't anything said.

404 The Court: Overruled.

Mr. Rogers: I except, and I also object on the ground that it is immaterial if the plaintiff was the owner of the claim it didn't make a bit of difference.

The Court: Overruled.
Mr. Rogers: I except.

Q. Well, did you report back his conversation to your board, after he had reported to you?
A. I called a meeting after that.
Q. And you told the board that Mr. Sampliner was willing to receipt his claim against your company for legal services if the company would assign to him this claim?
A. Yes, sir.
Q. You further told the board didn't you, that he stated that the expense of the claim, if the company sued it, would be some seven or eight thousand dollars?

Mr. Rogers: I object to that.

Q. Did you tell them that?

Mr. Rogers: I object on the ground it is incompetent, immaterial and irrelevant.
Overruled. Exception.

Q. Did you tell "them" that?
A. I told them that, no doubt, but I don't know whether I told them that at this meeting or not—I want to get it right.
Q. You told them at some meeting?
A. I told them at some meeting, yes.
Q. And did you recommend to the board the adoption of the idea that was finally formulated in the resolution?
A. I did.

Mr. Rogers: May I get my objection before the answer,
165 on the ground it is incompetent, irrelevant and immaterial?
Overruled. Exception.

Q. And was it at this meeting when you made the recommendation that the resolution was passed?

Mr. Rogers: I make the same objection.
Same ruling. Exception."

29. That the Court erred in admitting the testimony and overruling the objection of counsel for the plaintiff to the questions propounded on cross-examination by defendant's counsel to the witness, Mandelbaum, in respect to the taking of a receipt from the plaintiff for his bill, and as to the reason why there was no receipt, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. Did you take a receipt from Mr. Sampliner for his bill at the time that this document, Plaintiff's Exhibit 1, was signed?
A. No.

Mr. Rogers: I object to that as immaterial.
Overruled. Exception.

Q. The answer is no—why?

Mr. Rogers: I object to that as immaterial.
Overruled. Exception.

A. Because there was no bill."

30. That the Court erred in admitting the testimony and in overruling the objection of counsel for the plaintiff to the question propounded by counsel for the defendants to the witness,
406 Mandelbaum, as to whether a report or statement was made by the witness Mandelbaum, to the Mutual Film Company of the assignment of the cause of action to the plaintiff, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"By Mr. McCarter:
Q. After you sold out in March, 1912, to the Mutual Film, you continued as general manager of that enterprise run by the Mutual Film for how long?

Mr. Rogers: I object to that as immaterial.
The Court: I don't see that it makes any difference. I don't get the point.
Mr. McCarter: I want to see if he ever told his new bosses of this arrangement that he made.
The Court: Suppose you ask that question.
Mr. McCarter: I want to see if he was their manager.
The Court: I will allow it for that purpose.
Mr. Rogers: I except.

Q. How long did you remain as manager?
A. About a year afterwards.
Q. Did you ever tell them that just before you sold them your stock that you had assigned this claim that is now in suit for $750,000 to your lawyer for a claim of $5,000?

Mr. Rogers: Pardon me. First, I object to the form of
407 the question. I submit the form of the question is improper.
The Court: We can make it very short. Did you ever tell them about this claim?
Mr. Rogers: May I have my objection?
The Court: I sustained it, for brevity.
Mr. Rogers: I mean to your Honor's question, as incompetent, irrelevant and immaterial.
Overruled. Exception.
The Witness: I did not tell them. I didn't think it was of any importance at that time."

31. That the Court erred in excluding the testimony and sustaining the objection of counsel for the defendants to the questions propounded by counsel for the plaintiff to the witness, Mandelbaum, showing or tending to show that the Mutual Film Company, which had purchased the shares of stock of the plaintiff's assignor corporation, had after the said purchase, been dissolved or went out of

separate existence, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"By Mr. Rogers:

Q. Mr. Mandelbaum, when the Lake Shore Company was taken over by the Mutual Film Corporation, was there a change of officers in the corporation?
A. Yes, sir.
Q. Did you resign as president?
A. I did.
Q. Was there an entirely new set of officers elected?
A. There was no election to my knowledge.
Q. But, in any event, you and all the old officers had resigned?
A. All the officers had resigned.
408 Q. You sold your stock in the Company?
A. Yes.
Q. And was the name of the Lake Shore Company changed?
A. Not until about a year afterwards, or more.
Q. Was it subsequently changed?
A. Subsequently, yes.
Q. And was it thereafter known as the Mutual Film Corporation?
A. How is that?
Q. Was it thereafter known as the Mutual Film Company?
A. Yes, afterwards.
Q. What became of the Mutual Film Company?

The Court: Who cares, I don't.

Mr. Rogers: I would like to show that the Mutual Film Company dissolved and went out of existence.

The Court: It has nothing to do with this case.

Mr. Seabury: That is not as I understand it at all, it is still in existence.

Mr. Rogers: I think they were inactive at the time.

Mr. Seabury: They changed the name of the Company to the Mutual Film of Ohio, and then assigned to a company of the same name in Virginia.

The Court: It is utterly immaterial.

Mr. Rogers: Well, they produced the books themselves, your Honor.

Mr. McCarter: You said that a hundred times. We submit we have produced that book, of course we produced it, why keep hammering at it.

Mr. Rogers: In the book they produced at page 84, there is a notice of the meeting of stockholders for the purpose of dissolving the corporation.

409 The Court: What difference does it make, who cares, it has nothing to do with the case.

Mr. Rogers: Well, your Honor, so rules and I have my exception. I offer the proof and your Honor excludes it as being immaterial and I except.

The Court: All right."

32. That the Court erred in propounding, over plaintiff's objection, questions to the plaintiff during his direct examination by counsel for the plaintiff, seeking to elicit testimony as to the amount of damages disclosed by the balance sheet that was prepared after the claim was assigned to the plaintiff, and as to the difference between the amount prayed for in the complaint and the amount made known to the plaintiff through the balance sheet prepared by Mr. Sherman, to which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. When would you say that was furnished?

A. I am not positive. My impression is it was four or five months after the claim was assigned. I did not intend to bring any suit to start with when the matter was assigned to me.

The Court: Strike that out.

Q. Four or five months?

A. That is my recollection.

Q. Was it sometime after the 28th of December, 1911?

A. Yes, your Honor, it was sometime after that.

Q. Did this balance sheet disclose damages of $250,000?

A. No, sir, it did not

110 Q. Did it disclose some other figure?

A. It disclosed other figures.

Mr. Rogers: May I have an objection to this your Honor?

The Court: Yes, you may, and an exception.

The Witness: In the bringing of the suit in this jurisdiction the element of the value of the good will of the Lake Shore Film Corporation was taken into consideration.

Q. In other words when this complaint was drafted there was added a certain amount of the ad damnum clause in addition to what had been disclosed by Sherman's balance sheet?

A. I think also at this time if my counsel permits——

Q. Won't you answer my question. Is that correct?

A. I thought I had.

Q. Am I correct in understanding that after Sherman had shown you the balance sheet but prior to the filing of the complaint in the action, you added to the amount of damages prayed for an amount in addition to what Sherman's balance sheet showed?

A. I did.

Q. Did you add a particular amount or how is that?

A. I think a particular amount was added.

Q. So that the complaint in this action when it prays for $250,000 prays for an amount in addition to the amount made known to you by Sherman through the balance sheet you have spoken of?

Same objection, ruling and exception.

111 Q. Is that correct?

A. As I have stated before, while there was nothing said——

Mr. Rogers: One of the points of my objection was that his Honor's question assumed that Mr. Sherman's balance sheet was complete.

The Court: You misapprehend the question."

33. That the Court erred in propounding the question objected to by counsel for the plaintiff during the direct examination of the plaintiff by his counsel, in which the Court, in substance, inquired and elicited testimony as to whether the amount of damages that might be recoverable against the defendants was known at the time when the cause of action was assigned to plaintiff; as to whether the amount of recovery was then known or speculative; as to what items of damage were embraced in the claim of plaintiff's assignor; whether it was plaintiff's opinion that there should be a recovery of at least $75,000 against the defendants; whether the plaintiff knew as a lawyer, that it could not be predicted with any degree of certainty what the recovery would be, and, generally, the testimony showing that at the time of the assignment the amount of damages recoverable was not fixed or determined, and to all of which plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Q. On the 28th of December, 1911, you did not know what the damages was?

A. No, sir.

Q. And it was a pure matter of speculation, then, wasn't it?

412 A. As to the exact amount.

Same objection, ruling and exception.

Q. All that you knew at the time from your point of view as a lawyer was that the defendants may have damaged the plaintiff, the Lake Shore Company?

A. No, I wouldn't say that. I knew that the Lake Shore Company and Supply Company had been damaged. I had discussed that matter with the officers of the Company, especially Mr. Mandelbaum and I knew they had been damaged severely but I did not know the exact figure.

Q. Did you know they had been damaged by these defendants?

A. Yes, sir, I did.

Q. Now then at some later period which your recollection indicates to you was some three or four months after you asked Mr. Sherman to prepare balance sheets for you?

A. Yes, sir.

Q. And he did prepare such a balance sheet?

A. He did.

Mr. Rogers: I assume all this is subject to my same objection?

The Court: Yes, it is.

Mr. Rogers: And may I add to the objection now that your Honor's inquiries are addressed to what took place subsequent to the assignment of the cause of action?

The Court: The objection is overruled.

Mr. Rogers: An exception.

413 Q. Now then at sometime subsequent to the presentation to you of this balance sheet by Sherman you concluded that the damage suffered by the plaintiff was in addition to such an amount as was shown by the balance sheet, is that correct?

A. My recollection is that the balance sheet was——

Mr. Seabury: I move to strike that out.

The Court: He may answer.

The Witness: The balance sheet showed films rented during the year, the cost of film in other words. It also showed moneys received for the rental of the films during the year. It showed the gross profit. It showed the general expense of the business during the year, and in the subsequent year. And by a comparison of these two statements it showed a loss. Also when the license was cancelled I learned before the claim was assigned at the time when I discussed the matter with them that they had on hand a large amount of films which they were unable to use and which if they were used the user's license would be cancelled, and they were unable to use the films which they had the right to use for seven months after that license was cancelled, and that didn't show on that statement, if your Honor please.

Q. You still haven't answered my question. Get your mind on that balance sheet. When you made up the ad damnum clause in this complaint was some amount added to what was shown in the balance sheet?

414 A. I think the matter of the good will—I was in doubt in my mind at first as to whether any recovery could be had for the loss of good will.

Q. How much did you add for good will?

Mr. Rogers: May I have the same objection and exception?

The Court: Yes.

A. I think the good will and the depreciation and other items show in the neighborhood of $100,000.

Q. And the remaining $150,000 approximately was for injury to the property of the Lake Shore Company of which you were advised by Sherman's balance sheet.

Mr. Rogers: Wait a moment.

The Court: You may have an objection.

Mr. Rogers: And an exception.

The Witness: There were other items that entered i. matter of damages.

Q. Is it shown on the balance sheet?

A. The balance sheet simply had shown the business done the year before the cancellation and the year after, and the loss.

Mr. Rogers: I think a copy of that balance sheet is annexed to the bill of particulars.

The Court: I understand that perfectly.

Q. Now when was this suit brought with reference to the government decree against the Motion Pictures, before or after?

A. This suit in this court was brought after the decree in the government's case. In other words it was brought after the
415 United States Court in Pennsylvania had decided against the Motion Pictures Patents and others in an equity suit brought by the United States under the Sherman law?

A. That was not my——

Q. I just want to know when it was brought?

A. The suit in this jurisdiction against these defendants was brought after that decree.

Mr. Rogers: I was going to offer this decree and make it a part of the record.

The Court: I know the decree.

Mr. Rogers: May I have a copy of the decree in?

The Court: No, you may offer in evidence the exact date if you want to.

Mr. Rogers: I think we can agree on it, the 125th paragraph of the decree——

Mr. Seabury: I object to all dates in reference to that decree.

Mr. Rogers: The decree was entered the 24th of January, 1916.

The Court: When was the decision?

Mr. Rogers: October 1st, 1915.

The Court: When was this suit brought?

Mr. Rogers: January, 1917.

The Court: So the suit was brought after the decree?

Mr. Rogers: Yes, sir.

The Court: Then we are all agreed that the suit was brought after the Court's decree in the government case?

Mr. Seabury: And we have no objection to the date when
416 the Government's petition was filed.

Mr. Rogers: Let them offer it if they want it.

The Court: There is only one more question.

Q. On the 28th of December, 1911, could you say from the information at hand whether the damages to the Lake Shore Company was $5,000 or $250,000, or anywhere in between?

A. From the information that I had at that time, the discussions I had with Mr. Mandelbaum and the business that they had been doing and the loss of business that they had entailed, I had considered that they had damages to the extent of at least $75,000 at that time.

Q. So that you thought that his lawsuit would bring forth at least $75,000?

A. No, I did not consider a lawsuit at the time.

Q. You thought that this claim was a claim for $75,000, at least?

A. I thought that the Lake Shore Film and Supply Company had been damaged to that extent at least.

Q. And were you of the opinion at that time as an attorney who had been consulted in respect of these various transactions that if the lawsuit were brought there would be a recovery of at least $75,000?

Mr. Rogers: I object to the form of the question and further upon the ground that it has not been developed that when he
417 got the assignment it was for the purpose of commencing an action.

Objection overruled. Exception.

Q. (Last question read.)

A. I could not tell you. I didn't know whether there would or not.

Q. No. I say, were you of the opinion from such information as you had that if a lawsuit were brought that at least the sum of $75,000 could be recovered against the various persons who had wronged the Lake Shore Company?

A. I was not of that opinion. I figured that the loss—that they were damaged to that extent, but whether I could recover that amount I did not know.

Q. So you were not certain as to whether you could recover?

A. No, it was as to the amount that I was not certain.

Q. You were not certain as to the amount of money that could be recovered?

A. I know as a lawyer that a matter of damages is a matter for a jury to determine and I was not sure what amount a jury might return.

Q. In other words, you knew as a lawyer that you could not possibly say what the recovery would be or possibly predict, could you, with any degree of certainty?

Mr. Rogers: May I have the same objection and exception?
The Court: Certainly.

A. I knew as a lawyer, if your Honor please, that in any action of tort, for instance a personal injury case where a party is
418 injured, that the damage sustained depends upon the extent of the injury, and also at the pleasure of the jury, what they might do under those circumstances.

Q. My question was very simple. My question was whether you perfectly understood as a lawyer that anybody would be unable to predict what those damages would be?

Mr. Rogers: May I have the same objection and exception?
The Court: Certainly.

A. I am answering your Honor.

Q. The answer to that is yes or no.

A. I could not tell anyone definitely the amount that would be recovered because that was a question as I said before which depended upon the conclusion or decision of the Jury.

Q. And of course on the 28th of December not knowing accurately to what extent the Lake Shore Company had been damaged, you could not form any estimate, could you?

Same objection, ruling and exception.

A. I could not form any estimate as to the amount that would be recovered. I knew they were damaged to the extent of about $75,000, but what that recovery would be in a law suit if one was brought, I did not know."

34. That the Court erred in propounding the questions during the direct examination of plaintiff, and seeking to elicit the testimony during the direct examination of the plaintiff by his
419 counsel, over objection and exception by plaintiff as to the preparation of balance sheets subsequent to the assignment to the plaintiff, showing the amount of damages recoverable, and whether after the balance sheets were prepared the plaintiff in making up the ad dammum clause, added an amount to what was shown in the balance sheet, and as to whether he had in the ad dammum clause included an amount for the loss of good will, and what amount for good will was included by him in such ad dammum clause, to all of which plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

—. "Now then at some later period which your recollection indicates to you was some three or four months after you asked Mr. Sherman to prepare balance sheets for you?

A. Yes, sir.

Q. And he did prepare such a balance sheet?

A. He did.

Mr. Rogers: I assume all this is subject to my same objection?

The Court: Yes, it is.

Mr. Rogers: And may I add to the objection now that your Honor's inquiries are addressed to what took place subsequent to the assignment of the cause of action?

The Court: The objection is overruled.

Mr. Rogers: An exception.

Q. Now then at some time subsequent to the presentation to you of this balance sheet by Sherman you concluded that the
420 damage suffered by the plaintiff was in addition to such an amount as was shown by the balance sheet, is that correct?

A. My recollection is that the balance sheet was——

Mr. Seabury: I move to strike that out.

The Court: He may answer.

The Witness: The balance sheet showed films rented during the year, the cost of film in other words. It also showed moneys received for the rental of the films during the year. It showed the gross profit. It showed the general expense of the business during the year, and in the subsequent year. And by a comparison of these two statements it showed a loss. Also when the license was cancelled I learned before the claim was assigned at the time when I discussed the matter with them that they had on hand a large amount of films which they were unable to use and which if they were used the user's license would be cancelled, and they were unable to use the films which they had the right to use for seven months after that license was cancelled, and that didn't show on that statement, if your Honor please.

Q. You still haven't answered my question. Get your mind on that balance sheet. When you made up the ad dammum clause in

this complaint was some amount added to what was shown in the balance sheet?

A. I think the matter of the good will—I was in doubt in my mind at first as to whether any recovery could be had for the loss of good will.

421 Q. How much did you add for the good will?

Mr. Rogers: May I have the same objection and exception?

The Court: Yes.

A. I think the good will and the depreciation and other items shown in the neighborhood of $100,000.

Q. And the remaining $150,000 approximately was for injury to the property of the Lake Shore Company of which you were advised by Mr. Sherman's balance sheet?

Mr. Rogers: Wait a moment.

The Court: You may have an objection.

Mr. Rogers: And an exception.

The Witness: There were other items that entered into matter of damages."

35. That the Court erred in propounding the questions and eliciting the testimony during the direct examination of the plaintiff by his counsel over plaintiff's objection and exception, as to plaintiff's knowledge that he would be required to expend certain moneys in taking depositions in making proof that the defendants had violated the Sherman Anti-Trust Law, and other testimony as to the necessity upon the part of plaintiff to first establish a violation of the Anti-Trust Law, and to pay the disbursements necessary to get such proof, to all of which plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"Q. Did you know at that time if a law suit was brought that money would have to be expended to take depositions all over

422 the country?

Same objection, ruling and exception.

A. I knew that if a law suit were brought that it would entail an expense on my part.

Q. And that you would have to spend the money to take depositions?

A. That I would have to spend the money to take depositions.

Q. Now from such study as you have made, did you realize in 1911, December 28th, that the first thing you would have to prove against these defendants would be a violation of the Sherman Anti-Trust Law before you could recover damages?

Mr. Rogers: I would like to have your Honor ask the witness whether he knew of any proceedings by the Government at that time.

The Court: I will ask in my own way.

Mr. Rogers: I will object to it as incompetent, irrelevant and immaterial, and upon the further ground that I ask your Honor to take judicial notice that there was a suit pending at that time by the United States Government.

Mr. McCarter: No, you are mistaken.
Mr. Rogers: Yes, I will withdraw the latter part of the objection.

Q. If a suit was brought against these defendants did you as a lawyer know that the plaintiff in that suit would have to show a violation of the Sherman Anti-Trust Law before there could be any recovery for damages?

423 Same objection, ruling and exception.

A. When this suit was brought in the United States——
Q. I didn't ask you about that. On the 28th of December, 1911, when you took this assignment in evidence as Plaintiff's Exhibit No. 1, did you as a lawyer know that it would be incumbent upon any plaintiff to prove a violation of the Sherman Anti-Trust Law before there could be any recovery for damages?
A. I did.

Same objection, ruling and exception.

Q. Knowing that, did you also know that in order to get the evidence to establish that fact it would be necessary to take testimony of many witnesses throughout the country?
A. I did.

Same objection, ruling and exception.

Q. And did you realize at that time that to take such testimony would involve a very considerable expense?

Same objection, ruling and exception.

A. I knew this, and that the expense of railroad fares and hotel bills and the taking of the depositions would be involved. So far as my fees were concerned——
Q. I am only talking of the disbursements.
A. Yes, I knew that.
Q. And did you knew you would have to spend those disbursements out of your own pocket?
A. I did: I knew I was the only one who owned the claim
424 and that I would have to do whatever was done.
Q. And you perfectly understood that the Lake Shore Company was not able to pay those expenses?
A. I knew that the Lake Shore Film and Supply Company had nothing further to do with the claim.
Q. But you had been told by them that they could not pay the expenses of such a law suit?
A. They told me when I discussed with them about bringing a suit and I had fixed the price of $8,000 or $10,000, which included the expenses of paying me as well as the others, they told me they could not pay it. I knew that they could not afford to do it.
Q. You knew that they were financially unable to prosecute this law suit?
A. After they mentioned that fact to me, yes, sir.
Q. And when you took this assignment you were fully informed

of the necessity of you paying money out of your own pocket if any law suit was to be brought on this assigned cause of action?

A. I want to say that I knew that I being the owner of the claim that there was nobody else that would pay for it. I had to pay it. It was my claim then.

Q. I am not referring in this question to any bill for services. I am referring to the expenditure of disbursements. You knew perfectly well that any disbursements would have to be paid by you?

425 Same objection, ruling and exception.

Q. In whatever shape you regarded yourself, whether as the owner of the claim or what not, you knew perfectly well that the claim could never be enforced unless you paid out of your own pocke the disbursements necessary in taking the testimony to which reference has been had?

A. I knew this——

Q. You can answer that question. That is as simple as simple can be.

A. I intended to answer. I am not going to say anything but answer the question, but I wish to say that when that claim was assigned to me there was no doubt in my mind that I would be able without a law suit to settle that claim with these parties.

Mr. Seabury: I move to strike that out as not responsive to any question put.

The Court: Strike it out.

Mr. Rogers: I except.

The Witness: In connection with that——

Q. You have not answered my question. My question is that assuming for the purpose of the question that by this assignment you became the owner of the claim, you knew if a lawsuit was brought you would have to pay the disbursements?

A. I did, certainly.

Q. And that there was no one else in the world but yourself who would be called upon for that purpose?

A. I knew that."

36. That the Court erred in striking out the testimony of the plaintiff and in granting the motion of the defendants'

426 counsel to strike from the answer of the witness, Sampliner, his testimony that when the claim was assigned to him there was no doubt in his mind that he would be able without a law suit to settle that claim with the defendants, to which exception was duly taken, and from refusing to permit plaintiff to include as part of the testimony elicited by the Court, over plaintiff's objection and exception, that at the time plaintiff took the assignment of the cause of action he knew of the necessity of expending several thousand dollars to take depositions to prove violation of the Anti-Trust Law by the defendants; as additional testimony his explanation that although he knew of the necessity, he also had in mind when the claim was assigned to him, and believed that he would be able to

settle the claim without a law suit, to all of which the plaintiff duly excepted, as appears by the record and the bill of exceptions, as follows:

"Q. In whatever shape you regarded yourself, whether as the owner of the claim or what not, you knew perfectly well that the claim could never be enforced unless you paid out of your own pocket the disbursements necessary in taking the testimony to which reference has been had?

A. I knew this——

Q. You can answer that question. That is as simple as simple can be.

A. I intend to answer. I am not going to say anything but answer the question, but I wish to say that when that claim was assigned to me there was no doubt in my mind that I would be able without a lawsuit to settle that claim with these parties.

427 Mr. Seabury: I move to strike that out as not responsive to any question put.

The Court: Strike it out.

Mr. Rogers: I except.

The Witness:: In connection with that——

Q. You have not answered my question. My question is that assuming for the purpose of the question that by this assignment you became the owner of the claim, you knew if a law suit was brought you would have to pay the disbursements?

A. I did, certainly.

Q. And that there was no one else in the world but yourself who would be called upon for that purpose?

A. I knew that."

37. That the Court erred in propounding the questions and seeking to elicit the testimony over the objection and exception of counsel for plaintiff as to whether the plaintiff had made a demand for payment from the defendants or requested them to pay anything before suit was brought, and other errors to which objection and exception was duly taken, which appears by the record and bill of exceptions:

"By the Court:

Q. Prior to the beginning of the suit, had you made a demand on any of the defendants?

A. I had not; I had known——

Q. No, no, had you requested any of the defendants to pay anything?

428 Mr. Rogers: To this line of questions, it is included in my general objection as incompetent, irrelevant and immaterial.

The Court: Yes.

A. Was there a question?

Q. Yes, had you requested any of the defendants to pay anything?

A. Before that suit was brought?

Q. Before the Ohio suit was brought?

A. I am not sure. But I think that I had some talk with some one who was connected with one of these defendants in New York City.

Q. When was that?

A. Well, as I say, that is my best recollection, that I did before I brought this suit.

Q. Well, I say, when, can you fix the time?

A. No, I couldn't. I was down in New York City on other business as well.

Q. Can you name the person with whom you had the talk?

A. I don't remember—I thought it was a man by the name of Pelzer, but I wouldn't be sure of that.

Mr. McCarter: Who?

The Witness: I thought it was a man by the name of Pelzer, but I wouldn't be positive."

38. That the Court erred in propounding the questions over the objection and exception of plaintiff's counsel, and eliciting the testimony with respect to the amount of damages claimed in the suit brought in Ohio by the plaintiff against the General Film
429 Company as the sole defendant, and other exceptions which appear in the record and fall of exceptions as follows:

"By the Court:

Q. Well, did you ever bring such an action?

Mr. Rogers: I object to that as being immaterial.

A. I brought an action in the United States Court.

Q. Well, what was the theory of the action in the Ohio District?

A. Would have been one for damages.

Q. Well was it brought under the Sherman Law?

A. You mean the action that I brought in the Federal Court?

Q. Yes.

A. It was under the Sherman Law.

Q. What was the ad damnum?

A. I asked for damages for I think $101,000.

Q. In Ohio?

A. In Ohio—I had been debating in my mind whether the loss of good will could be taken into account.

Q. So in Ohio you asked for $101,000, which was the amount of damages, not the treble damages?

A. No.

Q. So the treble amount would be $303,000?

A. $303,000.

Mr. Rogers: Your Honor, I take it this is all taken subject to my objection and exception.

The Court: Yes."

430 39. That the Court erred in propounding the question over the objection and exception of counsel for the plaintiff as

getting the testimony that it would be necessary for the plaintiff if he brought an action under some statute other than the Sherman Law, or on a common law theory, to get the same kind of testimony that he would have to obtain under the Sherman Law, and which appears in the record and bill of exceptions, to all of which the plaintiff duly objected and excepted, as follows:

"Q. Before we leave that subject, would there have been any less necessity if you brought the action under some statute other than the Sherman Law, or bought it on some common law theory of getting the same kind of testimony that you would have to get under the Sherman Law?

Mr. Rogers: I object to that on the ground, if I may say so respectfully, that the witness could not undertake to answer that question; it depends on the nature of the suit he brought.

The Court: I am asking for his point of view; he can state his point of view.

Mr. Rogers: I except.

A. Kindly read that question.

Q. (Read.)

A. I knew I would have to have testimony of the parties that were named; I don't know how many I would have had; I knew there were a great many people injured—I didn't expect at any time to have the testimony of all the people."

40. That the Court erred in overruling the objection and exception of counsel for the plaintiff to the questions propounded on cross-examination by counsel for the plaintiff and in striking the testimony as to absence of mention in the assignment which the plaintiff drew, of a right of action under State laws or statutes, and all of which appears in the record and bill of exceptions, to which the plaintiff duly objected and excepted, as follows:

Cross-examination by Mr. McCarter:

Q. You talked about having considered the State Law, the so-called Valentine Law in Ohio, or other State Statutes authorizing this; you didn't mention them in the assignment which you drew, did you, Mr. Sampliner?

Mr. Rogers: I object to that as being immaterial.

A. You mean in the instrument of assignment, that I stated?

Q. Exactly.

Overruled. Exception.

Q. Did you mention any such statute?

A. I didn't state in the——

Q. The assignment?

A. Just a moment, please—I didn't state it in the instrument of assignment, but in my——

Q. One moment, now. You are a lawyer, and you know that if

a person assigns something to you in writing, they are supposed, by the writing, to cover everything they assign, you know that as a lawyer?

432 A. Well, I don't know what you have reference to, everything they assigned—what do you mean?

Q. If a person assigns something to you in writing, the writing covers the whole thing, don't it? As a lawyer don't you know that Mr. Sampliner?

A. Certainly, but I couldn't answer that question.

Q. You know that?

A. Let me answer the question, that although they had assigned to me their damages that they had sustained by reason of the violation of the Federal Anti-Trust Act, whatever damages they had sustained I could select whatever forum I pleased, either in the Federal Court or in the State Court.

Q. You drew the assignment, didn't you?

A. I did.

Q. And you provided that you were to secure, and did secure by it, all of the right and interest in and to any and all damages which the Lake Shore Film and Supply Company has sustained and suffered by reason of injury to its business because of the unlawful combination and monopoly in restraint of Interstate Commerce and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement, &c., all of the said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore Film Company and contrary to and in violation of the Sherman Anti-Trust Act, commonly known

433 A. I did.

as the Sherman Law. That is the way you drew the paper?

Q. Do you say that at that time you had procured an assignment for damages under any other Act than under the Sherman Anti-Trust Act?

Mr. Rogers: I submit that is a question of law and not for the witness to answer.

Overruled. Exception.

Q. Do you?

A. I say that under the assignment of that instrument the damages that they had sustained were by reason of the violation of the Federal Law.

Q. Very good; that is plain, isn't it?

A. Certainly, but I didn't——

Q. Well, now——

Mr. Rogers: Let him finish his answer.

The Court: No, he has answered and you may ask him on redirect. He is asked a simple question and he has answered it."

41. That the Court erred in overruling the objection of plaintiff's counsel and admitting the testimony as to what items were included in making up the damages claimed by the plaintiff, or the amount of damages suffered by the plaintiff's assignor; in overruling the ob-

jection made by counsel for the plaintiff to the questions propounded on cross-examination of the plaintiff by defendants' counsel, eliciting or tending to elicit the testimony as to the method by which the damages were made up or computed; and as to the items making up the sum of $161,000 claimed in the Ohio suit and the $250,000 claimed in the present suit, as appears by the record and bill of exceptions, and to all of which counsel for the plaintiff duly objected and excepted, as follows:

"Q. Now as I understand you, you got Mr. Sherman to go over the books; did you pay Sherman for that?

A. I did not.

Q. Who was paying Sherman to go over the books and find the amount of damages that you owned?

Mr. Rogers: I object to that as being perfectly immaterial, and on the ground it assumes someone else paid him.

The Witness: I had rendered——

Mr. Rogers: One moment.

Overruled. Exception.

The Court: Was anybody paying Sherman?

The Witness: Mr. Sherman was not paid at all by anybody.

Q. Oh, just out of goodness for you he did that work?

A. He did that work for me at my request.

Q. And he reported to you a loss, as he said, of about $100,000, is that right?

A. I don't think that that paper shows a loss of $100,000.

Q. How much did it show?

A. It was a mere matter of calculation.

Q. How much did it show?

A. I am telling you, this is a matter of calculation as to the balance sheets of each year; that is estimating the damage; I took into consideration the losses that the Lake Shore had sustained by reason, also, of the payment of the royalties of $2 per week of the machines that the exhibitors were requested to buy, or which the rental exchange paid—I took all these matters into consideration.

Q. I don't want a regular argument?

A. I am giving you the actual facts, as I arrived at it.

Q. How much did it amount to?

A. $161,000.

Q. At that time?

A. Yes, sir.

Q. At the time that Sherman made the report to you?

A. At the time of the assignment to me of the cause of action.

Q. The report that Sherman give you, gave damages, you say, amounting to $161,000?

A. Mr. Sherman never gave me that report. I am telling you.

Q. That is what I am asking you?

A. I say that Mr. Sherman at my request, had made out a balance sheet showing the differences in the earning power of that company the year before the cancellation of the license and the year after,

so as to show what the actual loss was, in dollars and cents as far as it could be computed; and also, he gave me the information and I had the information at the time of the transfer to me of the loss that they had sustained by reason of payment of royalties in place of the exhibitor. I also was told about the inability, by reason of
436 the restrictions that the manufacturers placed upon these rental exchanges and exhibitors, so that they were all unable to use the films which cost a lot of money, which they had a right to use several months after. In that way I obtained a statement of what the damages, as I supposed, were.

Q. I am asking you what damages the statement that Mr. Sherman made, gave you?

A. Mr. Sherman did not give me a statement of damages; he gave me a statement of the earnings of the lessee.

Q. And the earnings after deduction showed how much by his statement?

A. My impression is, as I remember it now, I think about $50,000 or $60,000. I don't remember—I don't remember it, that is all—clearly.

Q. Now, you drew this bill of particulars that was filed in this case?

A. I swore to it, yes.

Q. You swore to it, didn't you?

A. I did.

Q. It was right?

A. As I say, I swore to the bill of particulars as set forth there, based upon the figures that Mr. Sherman gave me.

Q. Now, I notice that by your answer to demand eleven, the profits that this concern made from January 1, 1910, to March 1, 1911, are, as I understand it, $65,000, is that right?

A. That was before the cancellation of the license, as I understand it.

437 Q. Are you sure about that?

A. I am.

Mr. Rogers: Mr. Sampliner, after you and Mr. McCarter get through with this controversy I would like to make an objection. May I have it noted, your Honor, I object to this line of testimony on the ground that we are not trying the general damages here and this testimony is incompetent, irrelevant and immaterial.

Overruled. Exception.

Q. So that down to March, 1911, your assignment being dated in December of the same year, the balance sheet of this concern showed a profit in the preceding year of $65,000?

A. Let me see that again, will you?

Q. (Same handed to witness.) Will you answer the question?

A. I see by this statement here, which is a copy of the balance sheet that Mr. Sherman gave me, that it is for the period from January 1, 1910, to March 1, 1911. The greater part of it——

Q. Will you answer my question?

A. I am. The greater part of that period is before there was any cancellation of the license.

Q. Well, at any rate——

A. Before they had even any competition with the General Film Company.

Q. You are not making any argument?

A. I am answering your question.

Q. They made a profit of $65,000 down to March, 1911, didn't they?

A. Yes, sir.

438 Q. So that any loss that you speak of came after March 1911?

A. After March, 1911.

Q. Now, you waited a year and five months after you got your assignment and then you commenced a proceeding out in Ohio, didn't you?

A. I did.

Q. Now, look at this document and see if you recognize it as a copy of your complaint out there (showing witness paper).

A. Yes, as I stated.

Q. For injury to the business of this Company by reason of the violation of the Sherman Act?

A. That is true.

Q. Commenced in the Federal Court?

A. Yes, sir.

Q. And you multiplied that $101,000 by 3 and said your total claim was $303,000?

A. By virtue of the Federal Trust Act the treble damages are allowed.

Q. Exactly?

A. And I brought suit under the Act as the Act permitted.

Q. Now, down to that time(at least, you were satisfied that your total claim for loss to that Company by reason of the Sherman Act was $101,000?

A. Yes, I said before——

Q. Answer my questions—"Yes"—I am trying to get through, I want to get away from here some time. You filed an amended petition in that action?

A. I did.

Q. How soon after that first petition was filed?

439 Mr. Rogers: I object to that.

Overruled. Exception.

A. I am going to answer the question.

Q. How soon after you filed your original petition did you file an amended petition?

Mr. Rogers: Your Honor, I have been excluded from both counsel tables—may I at least have an opportunity to object—in any event may I make an objection?

The Court: Yes.

Mr. Rogers: I object to this generally upon the ground it is improper, immaterial and irrelevant; it evidently goes to the general

damages in the case which we are not trying at this time, and I press my objection.

Overruled. Exception.

Q. The question is, when you filed it?

A. I think it was late in the fall, probably later than that, of the year 1913.

Q. About how many months or years?

A. I couldn't tell you exactly how long.

Q. Six months?

A. I couldn't tell you for this reason, that I was absent from the country for some time, and upon the filing of a motion on the part of the defendant they had filed a motion with thirty-one requests——

Mr. McCarter: I don't want all that, your Honor.

The Court: Yes, you must answer that question.

Q. How long a time, about?

A. After the Court had settled the matter of the motion, how long that took I don't know.

140 Q. About six months or a year?

A. I don't remember, I think it was probably six months, maybe longer.

Q. Look at that petition and see if that is a copy of the amended petition (handing witness paper)?

A. I think it is.

Q. And you stated the damages exactly the same in that?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial, not the issue we are trying here.

Overruled. Exception.

Q. You stated them the same?

A. Exactly.

Q. You drew both complaints?

A. I did.

Q. You then had this claim in your ownership for a period of at least two years, haven't you?

A. I think it would be close to that.

Q. You have been studying the matter?

A. Well, I had some work to do.

Q. And then you placed the damage at $101,000 in this amended complaint?

A. Yes, sir.

Q. What happened in the meantime, when you commenced this suit in January, 1917, in New York, under the Sherman Law that enabled you to raise the damage from $101,000 to $250,000?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial; on the grounds already urged, and

141 on the further grounds that the items going to make up the $250,000 are set forth in the bill of particulars which are now on file in this Court verified by the witness under date of April 6, 1913.

The Court: I will overrule the objection, and I will give you the reason why, which I thought I had outlined heretofore. All this line goes to determining whether this is a speculative cause of action. What men do is the index to their minds; what they say is not always an indication of what they think, and it frequently is incapable of construction, but what they do is the basis upon which a judgment may be predicated. Now, Mr. McCarter is simply pursuing, with a knowledge of the data presumably, a line that I have already indicated in my own examination.

Objection overruled and the question will be answered.

Mr. Rogers: I respectfully except.

The Court: Read the question.

Q. (Read.) Commenced in New York?

A. Before this suit was begun in New York I had received from the Government a great many of the exhibits that belonged to the Government, a great many receipts of the royalties paid by the Lake Shore Film & Supply Company of which I had no knowledge at the time I brought the suit in Cleveland, and it was apparent, after figuring the receipts and the royalties paid, which I did not have a good knowledge of at the time I brought the suit in Cleveland. I
442 found that the damages exceeded the amount as to that item.

Q. Is that the best explanation you can give?

A. Also that at the time I brought the suit, at the time I bought the claim. I was doubtful whether the loss of the good will of the business was a matter of damage.

Q. Did you mention good will in your lengthy complaint?

A. I think there is something said there in the bill of particulars.

Q. I asked you if you mentioned good will in the complaint?

A. I think so—I may be mistaken. I am not sure, it is very lengthy.

42. That the Court erred in overruling the objection of counsel for the plaintiff to the questions propounded to the plaintiff on cross-examination by defendants' counsel, and eliciting the testimony as to the amount of damages set forth by plaintiff in his original complaint or petition in the Ohio suit against the General Film Company as the sole defendant; as to the time when the amended petition was filed in the said Ohio suit; and that in the amended petition there was a claim for exactly the same amount of damages as was stated in the original petition in that suit; to all of which plaintiff duly excepted, as appears in the record and bill of exceptions, as follows:

"Q. Now, look at this document and see if you recognize it as a copy of your complaint out there (showing witness paper)?

A. Yes, s I stated.

433 Q. For injury to the business of this Company by reason of the violation of the Sherman Law?

A. That is true.

Q. Commenced in the Federal Court?

A. Yes, sir.

Q. And you multiplied that $101,000 by 3 and said your total claim was $303,000?

A. By virtue of the Federal Trust Act, the treble damages are allowed.

Q. Exactly?

A. And I brought suit under the Act as the Act permitted.

Q. Now, down to that time at least, you were satisfied that your total claim for loss to that Company by reason of the Sherman Act was $100,000?

A. Yes, I said before——

Q. Answer my questions—"Yes"—I am trying to get through. I want to get away from here sometime. You filed an amended petition in that action?

A. I did.

Q. How soon after that first petition was filed?

Mr. Rogers: I object to that.

Overruled. Exception.

A. I am going to answer the question.

Q. How soon after you filed your original petition did you file an amended petition?

Mr. Rogers: Your Honor, I have been excluded from both counsel tables—may I at least have an opportunity to object—in any event may I make an objection?

The Court: Yes.

444 Mr. Rogers: I object to this generally upon the ground it is improper, immaterial and irrelevant; it evidently goes to the general damages in the case which we are not trying at this time and I press my objection.

Overruled. Exception.

Q. The question is, when you filed it?

A. I think it was late in the fall, probably later than that, of the year 1913.

Q. About how many months or years?

A. I couldn't tell you exactly how long.

Q. Six months?

A. I couldn't tell you for this reason, that I was absent from the country for some time, and upon the filing of a motion on the part of the defendant, they had filed a motion with thirty-one requests——

Mr. McCarter: I don't want all that, your Honor.

The Court: Yes, you must answer that question.

Q. How long a time, about?

A. After the Court had settled the matter of the motion how long that took I don't know.

Q. About six months or a year?

A. I don't remember. I think it was probably six months, mayle longer.

Q. Look at that petition and see if that is a copy of the amended petition (handing witness paper)?

A. I think it is.

Q. And you stated the damages exactly the same in that?

445 Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial, not the issue we are trying here.

Overruled. Exception.

Q. You stated them the same?
A. Exactly.
Q. You drew both complaints?
A. I did.
Q. You then had this claim in your ownership for a period of at least two years, haven't you?
A. I think it would be close to that.
Q. You have been studying the matter?
A. Well, I had some work to do.
Q. And you then placed the damage at $101,000 in this amended complaint?
A. Yes, sir."

43. That the Court erred in overruling the objection of plaintiff's counsel to the questions propounded to the plaintiff by defendant's counsel on cross-examination and admitting testimony as to what happened between the time he filed the suit in Ohio against the General Film Company (as sole defendant), and claimed as damages $101,000, and the time when he began the present suit in January, 1917, in New York, that enabled him to raise the damage from $101,000 to $250,000, to which plaintiff duly excepted, and which appears in the record and bill of exceptions, as follows:

"Q. What happened in the meantime, when you commenced this suit in January, 1917, in New York, under the Sherman Law,
446 that enabled you to raise the damage from $101,000 to $250,000?

Mr. Rogers: I object to that on the ground it is incompetent, irrelevant and immaterial; on the grounds already urged and on the further grounds that the items going to make up the $250,000 are set forth in the bill of particulars which are now on file in this court verified by the witness under date of April 6, 1913.

The Court: I will overrule the objection, and I will give you the reason why, which I thought I had outlined heretofore: All this line goes to determining whether this is a speculative cause of action. What men do is the index to their minds; what they say is not always an indication of what they think, and it frequently is incapable of construction, but what they do is the basis upon which a judgment may be predicated. Now Mr. McCarter is simply pursuing, with a knowledge of the data presumably, a line that I have already indicated in my own examination. Objection overruled and the question will be answered.

Mr. Rogers: I respectfully except.

The Court: Read the question.

Q. (Read.) Commenced in New York?
A. Before this suit was begun in New York I had received from

the government a great many of the exhibits that belonged to the government, a great many of the receipts of the royalties paid by the Lake Shore Film & Supply Company of which I had no knowledge at the time I brought the suit in Cleveland, and it was ap-
447 parent, after figuring the receipts and the royalties paid, which I did not have a good knowledge of at the time I brought the suit in Cleveland. I found that the damages exceeded the amount as to that item.

Q. Is that the best explanation you can give?

A. Also that at the time I brought the suit, at the time I bought the claim, I was doubtful whether the loss of the good will of the business was a matter of damage.

Q. Did you mention good will in your lengthy complaint?

A. I think there is something said there in the bill of particulars.

Q. I asked you if you mentioned good will in the complaint?

A. I think so—I may be mistaken. I am not sure, it is very lengthy."

44. That the Court erred in ruling that as a matter of law that at the time the assignment was executed the plaintiff in this action did not know what the damage was and had no basis, of the character that a plaintiff must have when he brings a suit, and in ruling as a matter of law, that in an action of this kind that the plaintiff must know what his damages are; that he must know the general tenor of his cause of action in respect to which he has been injured, and he must have some basis upon which to make his own judgment; and admitting and excluding under the said ruling the testimony offered or taken showing such knowledge or lack of knowledge on the
448 part of the plaintiff, and all of which appears in the record and bill of exceptions, to which plaintiff duly objected and excepted, as follows

"The Court: That is utterly immaterial. The testimony is uncontradicted that at the time of this assignment the plaintiff in this action did not know what the damage was, and had no basis, of the character that a plaintiff must have when he brings his suit, even though the plaintiff had been the Lake Shore Company—that is to say, he must know what his damages are—by which I do not mean to be understood as saying he could liquidate his damages in his own mind, but he must know the general tenor of his cause of action in respect to which he has been injured, and he must have some basis upon which to make his own judgment."

45. That the Court erred in excluding the testimony of the plaintiff that in the computation of damages there was embraced or included the payments to defendants of certain alleged royalties at the rate of $2.00 a week made by the plaintiff's assignor, to the defendants, and in sustaining the objection of counsel for the defendants, to the question or questions of counsel for the plaintiff as to the $2.00 weekly payments, and as to why these payments were made, to which counsel for the plaintiff duly excepted, as appears by the record and Bill of Exceptions, as follows:

"Redirect examination.

By Mr. Rogers:

Q. In connection with the bill of particulars on file in this Court sworn to by you on the 6th day of April, 1917, the Clerk's file
449 mark as of April 8, 1917, there is a statement of certain royalties at the rate of $2 per week made by the Lake Shore Company to the defendant, the Patents Company, or to the Licensed Manufacturers for their benefit; was that amount definitely known, the amount of the payment of these royalties?

A. At the time of the bringing of the suit in Cleveland?

Q. At the time when you took the assignment?

A. No, I do not know. I knew that there were payments of money of a large amount for royalties, but I had no means of estimating exactly the amount.

Q. But you knew those payments had been made at the rate of $2 per week for the projecting machines?

A. I knew that payments had been made at the rate of $2 a week for the use of each machine that any of their customers had.

Q. And you are familiar now with the decision of the United States Supreme Court recently announced in the case of Motion Picture Patents Company vs. the Universal Film Manufacturing Company; without detailing at length what these royalties are about, are they generally the royalties referred to in the opinion of the United States States Supreme Court?

The Court: That is utterly immaterial. The testimony is uncontradicted that at the time of this assignment the plaintiff in this action didn't know what the damage was, and had no basis
450 of the character that a plaintiff must have when he brings his suit, even though the plaintiff had been the Lake Shore Company—that is to say, he must know what his damages are—by which I do not mean to be understood as saying he could liquidate his damage in his own mind but he must know the general tenor of his cause of action in respect to which he has been injured, and he must have some basis upon which to make his own judgment.

Mr. Rogers: Well, your Honor, he has already testified——

The Court: I understand the testimony.

Mr. Rogers: Well, unless I have entirely misconceived the purpost of his testimony, I think he used the figure $75,000 and he said that he knew that at least that amount had been sustained in damages.

The Court: I am not going to spend any time on the case of the Motion Picture Patents Company vs. the Universal Film Manufacturing Company.

Mr. Rogers: Then I will get at it in another way, your Honor.

Q. Had you known on December 28, 1911, that it had been the practice of these defendants to compel the Lake Shore Company to pay to these defendants the sum of $2 per week for each projecting

machine upon which the film distributed by the Lake Shore Film Company was used?

A. I had.

451 Did you know at that time that the payment of this $2 per week was exacted upon projecting machines which had been owned outright by the persons who had purchased them before the organization of the Motion Picture Patents Company?

A. I had.

Q. Will you state generally what information you had regarding these $2 a week payments?

Mr. Seabury: I object to that as immaterial.

The Court: Sustained.

Mr. Rogers: I except.

Q. Did you consider, as an item of damage, on December 28, 1911, at the time of this assignment, that there had been paid a number of thousands of dollars to the defendants by the Lake Shore Company at the weekly rate of $2 per week for the film shown on projecting machines used by the exhibitors dealing with the Lake Shore Company?

A. I did.

Q. What were these $2 a week payements?

Mr. Seabury: I object to that as immaterial. He couldn't have known the United States Supreme Court was going to reverse Henry vs. Dick several days later.

The Court: Sustained.

Mr. Rogers: I except.

Q. Was the amount of these so-called royalties of $2 per week payments contained in the books of the Lake Shore Company so that they could be definitely ascertained?

A. Yes, they could have been definitely ascertained.

452 Q. And were there receipts or acknowledgment among the papers of the Lake Shore Company from the defendant, The Patents Company acknowledging receipt of payments?

Mr. Seabury: I object to that.

A. A great many.

The Court: Sustained.

Mr. Rogers: I except."

46. That the Court erred in sustaining the objections of counsel for the defendants to the questions of plaintiff's counsel to the plaintiff, and in excluding the testimony elicited or sought to be elicited that there were among the papers of the plaintiff's assignor, receipts or acknowledgments from the defendant Patents Company acknowledging the receipt of the payments of $2 a week royalties or payments and to which counsel for the plaintiff duly excepted, which appears by the record and bill of exceptions as follows:

"Q. Was the amount of these so-called royalties of $2 per week payments contained in the books of the Lake Shore Company so that they could be definitely ascertained?

A. Yes, they could have been definitely ascertained.

Q. And were there receipts or acknowledgments among the papers of the Lake Shore Company from the defendant, the Patents Company acknowledging receipt of payments?

Mr. Seabury: I object to that.

A. A great many.

The Court: Sustained.

Mr. Rogers: I except."

453 47. That the Court erred in requiring plaintiff to make proof in addition to the documentary proof consisting of the written assignment, coupled with proof of the authority of the officers executing the same; plaintiff having duly objected and excepted to the introduction of the further testimony and the questions seeking to elicit the testimony beyond that.

48. That the Court erred in requiring the plaintiff to make proof beyond the execution of the assignment by the proper officers and its delivery to the plaintiff, and to which plaintiff duly excepted.

49. That the Court erred in ruling as a matter of law that plaintiff's title and his right to maintain the action was not established, prima facie, by the proof that the assignment was executed by the President and Secretary of the Lake Shore Film & Supply Company the plaintiff's assignor, with the seal of the corporation affixed at the time of delivery, and by proof of the delivery to the plaintiff, and to which plaintiff duly excepted.

50. That the Court erred in entertaining a motion for a direction of a verdict by the defendants, and to which plaintiff duly excepted, and which appears in the record and bill of exceptions, as follows:

"Mr. Seabury: In other words, to present this question, the defendants rests.

454 The Court: You move for the direction of a verdict?

Mr. Seabury: Yes.

The Court: The defendant rests and moves for the direction of a verdict. Now will you state the grounds.

Mr. Seabury: I move for a direction of a verdict on the ground that the plaintiff has not shown title to this cause of action; on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void. I think your Honor would ransack the books to find a clearer case of champerty——

The Court: I do not care to hear you on that.

Mr. Seabury: I think these two grounds cover it.

Mr. Rogers: Does your Honor care to hear argument?

The Court: No, I don't care to hear argument. I don't want to

seem discourteous, but I have studied this case with great care; I took the brief of both sides, and I have given it careful consideration, as far as matters of law are concerned.

Mr. Rogers: Well, if your Honor finds against the plaintiff, then it must be a non-suit, it can't be a verdict.

The Court: The defendant rests.

Mr. Rogers: We are not trying the general issue.

455 Mr. Seabury: If we are willing to waive all our rights on all other issues, how can they complain?

Mr. Rogers: I am getting down to the practice.

The Court: I am not disturbed about the practice.

Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.

The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the court.

The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury, that is entirely for you to determine.

Mr. Rogers: Well, if there are any questions of fact to be
456 disposed of, your Honor, I ask to go to the Jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any "ifs." If you think, under section 973 of the Code, the Court has no right to make a direction and you are right about it, you will have a good exception; if on the other hand the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case."

51. That the Court erred in refusing to grant the motion of the plaintiff to submit to the jury the questions of fact as to whether the plaintiff took an assignment of the cause of action with the intent and purpose to begin an action thereon, and as to whether the assignment to him was bona fide for an antecedent indebtedness, all of which appears more particularly in the record and bill of exceptions, as follows:

"Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any "ifs." If you think, under Section 973 of the Code, the Court has no right to make a direction and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case.

457

Mr. Rogers: Then, your Honor, may I state my position on the record.

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction, in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action there in and whether the assignment to him was bona fide for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule."

52. That the Court erred in its finding that the plaintiff purchased the cause of action with intent to sue thereon, and in making any finding of fact with respect thereto, to which plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

458 I find, as a fact, also * * * * * * *

* * * * * * * * * * *

I grant the motion and direct a verdict for the defendants.

Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the question of fact, if any there be."

53. That by the record and bill of exceptions herein, it appears that the Court erred in directing a verdict in favor of the defendant upon the conclusion of all of the testimony introduced upon the trial of the issues framed under the order of the Court entered May 2, 1917, to which the plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"Mr. Seabury: In other words, to present this question, the defendant rests.

The Court: You move for the direction of a verdict?

Mr. Seabury: Yes.

The Court: The defendant rests and moves for the direction of a verdict. Now, will you state the grounds.

Mr. Seabury: I move for a direction of a verdict on the ground

that the plaintiff has not shown title to this cause of action; on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void.

I think your Honor would ransack the books to find a clearer case of champerty——

470 The Court: I do not care to hear you on that.

Mr. Seabury: I think these two grounds cover it.

Mr. Rogers: Does your Honor care to hear argument?

The Court: No, I don't care to hear argument. I don't want to seem discourteous, but I have studied this case with great care; I took the brief of both sides, and I have given it careful consideration as far as matters of law are concerned.

Mr. Rogers: Well, if your Honor finds against the plaintiff, then it must be a non-suit, it can't be a verdict.

The Court: The defendant rests.

Mr. Rogers: We are not resting the general issue.

Mr. Seabury: If we are willing to waive all our rights on all the other issues, how can they complain?

Mr. Rogers: I am getting down to practice.

The Court: I am not disturbed about the practice.

Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.

The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

480 Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make if it should be adverse, or you can ask to go to the jury, that is entirely for you to determine.

Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any "ifs." If you think, under Section 973 of the Code, the Court has no right to make a direction and you are right about it, you will have a good exception; if on the other hand the Court is right, your exception will be addressed not to the question of practice, but to the substantive question in the case.

Mr. Rogers: Then your Honor, may I state my position on the record?

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction, in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

My understanding is that the question is one of law to be
461 passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule.

Mr. Rogers: Then I move for a direction, your Honor, for the plaintiff, upon the issues framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded: The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

462 I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors.

Having thus disposed of the facts, I proceed to express, briefly, my views of the law of the case.

The Sherman Anti-Trust Law was enacted by Congress with the fundamental purpose of redressing what Congress regarded as grievous wrongs visited upon persons by those combinations or monopolies which the statute denounced. It provided, broadly speaking, two kinds of remedies: One was a suit in equity at the instance of the government to dissolve unlawful combinations, and in that manner to destroy conspiracies directed against what Congress regarded as the appropriate conduct of the business of this country; the other remedy which was afforded was to give to the person injured in his business or his property an opportunity to recover damages for injury to his business or his property, and Congress provided that whatever the damage was which the jury might find, that damage should be trebled—the theory being that the injured person should be recompensed in a manner so exemplary that it would be a lesson to others.

Now, the courts have held that that provision does not provide for

a penalty, but must be regarded as in the nature of damage compensation. It certainly never could have been the intent of Con-
463 gress that so important a remedy having to do with the appriate conduct of the business of the country should be the subject matter of bargain, sale and speculation at the hands of attorneys.

Judge Hough has held, and I am bound to follow his holding, in the Imperial Film case that such a cause of action is assignable. I must therefore start with the assumption, that, as a matter of law, the cause of action could be assigned, and it is probably true that if the courts thus hold, it will be because that they feel that in a proper case a merchant or corporation which has been injured may so avail of its cause of action as to be serviceable to its creditors, or perhaps to other persons. But I have a strong conviction that it never will be held in a Federal Court, either in the court of original jurisdiction or in appellate court, that such a cause of action is merchandise to be availed of by an attorney.

I personally, and every gentleman in this case, on both sides, have a very deep regard for the profession to which we belong. It is a profession which insists that its purposes are noble and its practice are useful. It is the duty of the lawyer to render services, to advise, to assist and aid those whose life or liberty or property is in one manner or another in peril. But the moment a lawyer steps down from that high place to be a speculator in law suits, he is absolutely violating every tradition of the profession, and the courts have persistently frowned on that sort of thing.

464 The case is entirely different from where a lawyer, for services rendered, takes an assignment of some thing in action, clearly and unquestionably to recompense himself for such services.

Now, what is this case? In this case a lawyer for services that he is willing to settle for $5,000, cash, takes an assignment of a claim which he himself thought was worth at least $75,000 and which, multiplied, makes over $200,000. He then proceeds, later, to bring a law suit in which he makes these damages $101,000 which, trebled means $303,000; and then he comes into this jurisdiction with a claim of $270,000 which, trebled, makes $770,000—if that is not the rankest kind of speculation, I never heard of a case in my life that involved speculation.

More than that, little things in a law suit are of great service, and, in response to Mr. McCarter's final cross-examination, I noted that the plaintiff said, "The time I bought the claim"—that is unquestionably what he did; if he could get a settlement, well and good; if he couldn't get a settlement then he could speculate upon what damages he could obtain.

Now, these defendants, if they were guilty of wrongs, could have responded in a law suit to the true plaintiff; this plaintiff's attorneys would have had the right to say, 'I will take this law suit for you on a contingency, dependent on recovery,' and if he had done that he would not have violated the law in any respect, as I understand it—but he was ready to take this claim and pay money out
465 of his own pocket, which is champertous in itself, for the disbursements necessary to prosecute this law suit to an end.

Now, both sides have presented many authorities: I do not think the case is one that requires much citation of authority, and I shall content myself with placing, as part of my opinion that I am now delivering orally upon this record, the significant words of a great Judge, Chancellor Kent, in a case where perhaps the facts were a little different, but with the clarity and firmness that characterized his judicial career. He puts the matter in language that any man may understand, and he said:

"The purchase was avowedly made as a matter of speculation, and at a time when the attorney knew from previous disclosures made to him in his character of attorney, all the facts on which the foundation of the claim so purchased rested, and which created a belief in his mind that the value of the wine could be recovered. Such a purchase, by such an officer, and under such circumstances, cannot be sustained. It is champerty, for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law as by the statute." * * *

And he continued, and I am quoting from Arden v. Paterson, 5 Johnson's Chancery, * * *

"The purchase of a law suit by an attorney, in a case like
426 this, is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character, to speculate in law suits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community."

Adopting these clear and unquestioned statements as the doctrine to which every lawyer and judge who loves his profession must subscribe, I grant the motion and direct a verdict for the defendants.

Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be.

(Whereupon, as directed by the Court, the jury found a verdict in favor of the defendants.)

(Whereupon the jury was discharged.)

Mr. Rogers: First, I except to the verdict being received from the jury, my contention being that the Court is limited merely to declaring a non-suit that the direction of a verdict in favor of the defendant is not authorized by the Statute or the practice."

54. That the Court erred in refusing to allow the case to go to the jury on the questions of fact, if any there be, and to which
467 the plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be."

55. That the Court erred in receiving a verdict from the jury, in favor of the defendants, and to which plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"The Court * * * I grant the motion and direct a verdict for the defendants.

Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be.

(Whereupon, as directed by the Court, the jury found a verdict in favor of the defendants.)

(Whereupon the jury was excused.)

Mr. Rogers: First, I except to the verdict being received from the jury, my contention being that the Court is limited merely to declaring a non-suit that the direction of a verdict in favor of the defendant is not authorized by the statute or the practice."

56. That the Court erred in denying the motion of the plaintiff to set aside the verdict of the jury, and to which plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"Mr. Rogers: I also move to set aside the verdict of the
468 jury upon the ground that it is against the law, against the evidence, against the weight of evidence and upon all the grounds set forth in Section 999 of the Code, except the insufficiency and inadequacy of damages, because the jury has not awarded damages to the plaintiff.

The Court: Denied.

Mr. Rogers: I except."

57. That the Court erred in denying the motion of the plaintiff for a new trial, to which the plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"Mr. Rogers: * * *

I also move for a new trial upon all the grounds set forth in Section 999 of the Code, excepting that of insufficiency or inadequacy of damages, on the minutes of the trial and the exceptions taken throughout.

The Court: Motions are denied. * * *

* * * * * * *

The Court: Denied.

Mr. Rogers: I except."

58. That the Court erred in denying plaintiff's motion for a direction of a verdict in favor of plaintiff, upon the issues framed under the order of Judge Mayor, on the ground the defendant failed to make out the defense set up in the answer, but instead directed a verdict for the defendants, to which plaintiff duly excepted, as appears by the record and bill of exceptions, as follows:

"Mr. Rogers: Then I move for a direction, your Honor, for the plaintiff, upon the issues framed under your Honor's order
469 on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased

this cause of action—that is the defense that is set up and I desire to call your Honor's attention particularly to the form of the defense as pleaded: The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

The Court: * * *

Adopting those clear and unquestioned statements as the doctrine to which every lawyer and judge who loves his profession must subscribe, I grant the motion and direct a verdict for the defendants.

Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be."

59. That the Court erred in ruling or holding as a matter of law that

"The case is entirely different from where a lawyer for services rendered, takes as assignment of some thing in action, clearly and unquestionably, to recompense himself for such services."

and to which plaintiff duly excepted.

470 60. That the Court erred in ruling that the law applicable to this case was governed by the decision in Arden v. Paterson, 5 Johnson's Chancery, to which plaintiff duly excepted.

61. That the Court erred in ruling or holding as a matter of law that the reasonable value of plaintiff's services for which the assignment was taken, being less than the estimated damages recoverable, affected the legality or validity of the transaction between the plaintiff and his assignor, so that the defendants could urge it as a defense to this action, to which plaintiff duly excepted.

62. That the Court erred in ruling or holding as a matter of law that the fact that the plaintiff first instituted an action in the Federal Court in Ohio against the General Film Company, as sole defendant (not a party to this action), making a claim of damages in the sum of $101,000.00, which trebled makes $303,000.00, and then later instituting an action in this Court against these defendants in the sum of $250,000.00, which trebled makes $750,000.00, develops that the assignment to the plaintiff was speculative or for the purpose of speculation, and that the defendants could urge it in defense to this action, to which plaintiff duly excepted.

64. That the Court erred in ruling, as a matter of law, that the plaintiff having taken an assignment of the cause of action, which he knew would necessitate that he pay money out of his own pocket for the disbursements necessary to prosecute this law suit to an 471 end, would be champertous in itself, to which plaintiff duly excepted.

Wherefore, the plaintiff, the appellant, for these and divers and various other errors too numerous to set forth in full or mention

herein, prays that the judgment or decree of the District Court for the Southern District of New York, entered herein on the 5th day of September, 1917, in place and in lieu of the judgment originally entered on the 12th day of July, 1917, be in all respects reversed;

That judgment be directed in favor of the plaintiff upon the issues framed for trial under the order entered herein on May 31, 1917, providing for the separate trial of the issues specially selected or designated therein, or that a new trial may be granted, and the said District Court be ordered to enter a decree, reversing the judgment or decree, of the lower Court in said cause, and that speedy justice be done in the premises.

ROGERS & ROGERS,
Attorneys for Plaintiff.

Office & Post Office Address, 66 Broadway, Borough of Manhattan, New York City.

472 *Petition for Writ of Error.*

United States District Court for the Southern District of New York.

L 16-175.

JOSEPH H. SAMPLINER, Plaintiff,
against
MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters, and William Pelzer, Defendants.

To the Honorable Judges of the United States District Court for the Southern District of New York:

Joseph H. Sampliner, plaintiff in the above entitled cause, feeling himself aggrieved by the judgment entered on September 5th, 1917, in substitution of the judgment entered herein on July 12th, 1917, on the verdict rendered upon the direction of the Court on the issue of champerty, in favor of the defendants and for costs, comes now by Rogers & Rogers, his attorneys, and petitions said Court for an order allowing said plaintiff a writ of error to the United States Circuit Court of Appeals for the Second Circuit, under and ac-

473 cording to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security, which the defendant shall give and furnish upon said writ of error, and upon the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray.

ROGERS & ROGERS,
Attorneys for Plaintiff.

Office & Post Office Address: No. 66 Broadway, Borough of Manhattan, City of New York.

474 *Order Allowing Writ of Error.*

United States District Court for the Southern District of New York.

L 16-175.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters, Defendants.

On motion of Rogers & Rogers, attorneys for the plaintiff, and upon filing the petition for a writ of error and assignment of errors, it is

Ordered, that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, a judgment heretofore entered herein on September 5th, 1917, in substitution of the judgment entered herein on July 12th, 1917, and that the amount of bond for such writ of error be and hereby is fixed at Two Hundred Fifty Dollars.

Dated, Dec. 31, 1917.

MANTON,
U. S. D. J.

475 *Bond for Damages and Costs.*

District Court of the United States of America for the Southern District of New York in the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters, and William Pelzer, Defendants in Error.

Know all men by these presents:

That We, Joseph H. Sampliner, of —— as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, as Surety, are held and firmly bound unto the above named Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A.
476 Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer,

Jacques A. Berst, Albert E. Smith, Percival Waters and William Pelzer, in the sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to the said Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters and William Pelzer, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated, this 28th day of December, 1917.

Whereas, the above named Joseph H. Sampliner has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment dated the 12th day of July, 1917, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Joseph H. Sampliner, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation to be void, otherwise the same shall

477 be and remain in full force and virtue.

JOSEPH H. SAMPLINER. [L. S.]

Signed, Sealed and Delivered, in the presence of:

WM. J. WILSON.
M. A. KLEPETCO.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
By S. FRANK HEDGES,
Attorney-in-Fact.

Attest:
ADOLPHUS A. JACKSON,
Attorney-in-Fact.

THE STATE OF OHIO,
Cuyahoga County, ss:

[SEAL.]

I, Edmund B. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid,

Do hereby certify that Wm. J. Wilson, before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a notary public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is ex-

478 ecuted according to the laws of the State of Ohio.

Commission expires July 7th, 1920.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at Cleveland, this 31st day of Dec. A. D. 1917. No. 7326.

EDMUND B. HASERODT, *Clerk.*

STATE OF OHIO,
City of Cleveland,
County of —, ss:

On this 31st day of December, 1917, before me personally came Joseph H. Sampliner, to me known and known to me to be the person described in and who executed the foregoing instrument and who duly acknowledged to me that he executed the same.

WM. S. WILSON, [SEAL.]
Notary Public.

Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the
479 annexed bond of Joseph H. Sampliner, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Joseph H. Sampliner is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such Attorney-in-fact of said Company; and that he is acquainted with Adolphus A. Jackson, and knows him to be Attorney-in-fact of said Company and that the signature of said Adolphus A. Jackson, subscribed to said bond is the genuine handwriting of said Adolphus A. Jackson, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

480 Sworn to, acknowledged before me, and subscribed in my presence this 28th day of Dec., 1917.

AUGUSTUS WALLAUER,
Notary Public, New York County.

Notary Public, Queens County No. 1988.
Certificates filed in New York County No. 309, Register's No. 9238.
King's County No. 97, Register's No. 9101.
Bronx County No. 18, Register's No. 948.
Richmond, Westchester, Nassau, Pelham, Orange and Suffolk Counties.
Term expires March 30th, 1919.

481 *Citation.*

By the Honorable Martin T. Manton, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Peizer, Jacques A. Berst, Albert E. Smith, Percival Waters, Greeting.

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhat-an in the City of New York, in the District and Circuit above named, on the 29th day of January, 1918, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Joseph H. Sampliner, is the plaintiff in error and you are the defendants in error, and you are cited to show cause, if any they be, why the judgment or decree rendered herein against said plaintiff in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this
482 31st day of December, in the year of our Lord One Thousand Nine Hundred and Seventeen, and of the Independence of the United States the One Hundred and Forty-second.

MANTON,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

483 *Stipulation.*

United States District Court, Southern District of New York.

JOSEPH H. SAMPLINER, Plaintiff in Error,

vs.

MOTION PICTURE PATENTS COMPANY et al., Defendants in Error.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, February 18, 1918.

ROGERS & ROGERS,
Attorneys for Plaintiff in Error.
CHARLES F. KINGSLEY,
Attorney for Defendants Marvin, Motion Picture Patents Co., Biograph Co., Jeremiah J. Kennedy.
GEORGE F. SCULL,
Attorney for Defts. Thomas A. Edison, Inc., William Pelzer, Kalem Company, and Frank L. Dyer.
SEABURY, MASSEY & LOWE,
Attorneys for Defts. Albert E. Smith and Vitagraph Co. of America.
COUDERT BROTHERS,
Attorneys for Defts. Pathe Freres and Jacques A. Berst.
DWIGHT MACDONALD,
Attorney for Deft. Percival L. Waters.

484 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

JOSEPH H. SAMPLINER, Plaintiff in Error,

vs.

MOTION PICTURE PATENTS COMPANY et al., Defendants in Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 18th day of February in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the said United States the one hundred and forty-second.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

485 United States Circuit Court of Appeals for the Second Circuit, October Term, 1918.

No. 13.

Argued November 6, 1918. Decided December 11, 1918.

JOSEPH H. SAMPLINER, Plaintiff-in-Error. (Plaintiff Below),

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert B. Smith, Percival Waters, Defendant-in-Error. (Defendant Below).

In Error to the District Court of the United States for the Southern District of New York.

Before Rogers, Hough and Manton, Circuit Judges.

Rogers & Rogers, Attorneys for Plaintiff-in-Error.
Gustavus A. Rogers, Saul E. Rogers, John G. White, C. A. Neff, Joseph Walker Magrauth, Nathan Frankel, of Counsel.

486 Seabury, Massey & Lowe, Attorneys for Albert E. Smith and Vitagraph Company of America, Samuel Seabury, William M. Seabury, Frank de R. Storey, of Counsel.
George F. Seull, Attorney for Thomas A. Edison, Inc., Frank L. Dyer and William Pelzer.
Robert H. McCarter, Of Counsel.
Coudert Brothers, Attorneys for Jacques A. Berst and Pathe Freres.
Samuel Seabury, Charles B. Samuels, Of Counsel.
Charles F. Kingsley, Attorney and Counsel for Motion Picture Patents Company, Jeremiah J. Kennedy, Harry M. Marvin and Biograph Company.
Gifford, Hobbs & Beard, Attorneys for Kalem Company (Inc.)
Alfred W. Seaman, Of Counsel.
Dwight McDonald, Attorney for Percival L. Waters.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

The action is brought by the plaintiff as assignee of the Lake Shore Film and Supply Company (hereinafter called the Lake Shore Company) under the Sherman Anti-Trust Act to recover treble damages for injuries alleged to have been sustained by the business and property of the Lake Shore Company.

The plaintiff is a citizen of the State of Ohio and is and has been for the last twenty-five years an attorney-at-law practicing in the courts of that State.

The Lake Shore Company is a corporation organized under the

laws of the State of Ohio having its principal place of business in the City of Cleveland. Since its incorporation it has been engaged in the business of dealing in positive motion picture films or subjects, and also in projecting machines and appliances, used,
487 sold and leased in connection with motion picture exhibitions.

The bill of complaint is long and complicated and occupies sixty printed pages of the record. It narrates the various steps taken by the defendants in their alleged attempt to drive the Lake Shore Company out of business and to ruin and destroy its good will and its assets. It is alleged that because of this conspiracy it became necessary for the Lake Shore Company to employ legal assistance and that it became obligated to pay $5,000.

On December 28, 1911, the Lake Shore Company assigned to the plaintiff all of its right, title and interest in any and all of its claims for damages against the defendants or any of them by reason of their acts and conduct.

The plaintiff sues as an assignee of the Lake Shore Company to recover $750,000, alleging that the Company had been injured in its business up to December 28, 1911, to the extent of $250,000 and that by reason thereof he is entitled under the Sherman Anti-Trust Act of July 2, 1890, and the Act of Congress of April 12, 1914, amendatory thereof, to treble damages, making the sum $750,000.

The defendants in their answer set up two affirmative defenses—the statute of limitations and champerty. As respects the latter it "alleges upon information and belief, that at the time of said alleged purchase, it was, and is now, the law of the State of Ohio, that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such demand by such purchase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the State of New York. Alleges upon information and belief, that the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon."

488 On May 22, 1917, an order was entered granting a separate trial on the issue of champerty and providing that if the judgment of the Court or the verdict of the jury on that issue should be in favor of the plaintiff the trial of the other issues should be set for the June or October Term.

The case came on for trial on the issue of champerty on May 29, 1917. Testimony was taken on behalf of the plaintiff and at the conclusion thereof the defendants moved for the direction of a verdict on the ground that the agreement under which the plaintiff brought his action is Champertous and void. The plaintiff also asked for a direction of a verdict. The court directed a verdict for the defendant. Judgment was entered accordingly on July 12,

1917, which was in certain particulars amended on September 5, 1917.

The plaintiff brings the case here on writ of error. He assigns 62 errors and the assignment of errors covers 104 printed pages of the record.

ROGERS, *Circuit Judge* (after stating the above facts):

The only question it is necessary for us to consider is whether the assignment of December 28, 1911 is champertous and void. If it is void the plaintiff cannot maintain his action. If it is not void the judgment must be reversed.

The assignment states that "For value received The Lake Shore * * * Company * * * hereby sells, assigns and transfers to J. H. Sampliner, all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement, by and between The Motion Picture Patents Company * * *, all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore* * * Company, and contrary to and in violation of the Sherman Anti-Trust Act * * *."

489 The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants and that those services extended over a period from July 1910 to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the President of the Lake Shore Company whether he would be willing to bring suit against the defendants, and that he replied that he would bring the suit being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him and replied in the neighborhood of $9,000 or $10,000. He was told the company did not have the money and could not pay him, and thereupon he said that if the company would pay him $5,000 in cash he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment and was told that the board of directors wanted to know whether if they made an assignment the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties

with the defendants. He agreed to do this and the assignment was executed.

It appears therefore that the assignment originated not with the plaintiff but with the Lake Shore Company, and that the consideration for the agreement involved the payment of a past indebtedness as well as for future services of a professional character. It
[20] is also to be noted that the invalidity of the assignment is set up not by the client, the assignor, who has at no time sought to repudiate it, but by third parties between whom and the plaintiff no fiduciary relations have existed.

At common law no right of action, whether a right en rem or a right in personam, whether it arose ex contractu or ex delicto was assignable. Lord Coke wrongly attributed the rule to the doctrine of maintenance and the aversion to the "multiplying of contentions and suits." Langdet's Case, 10 Rep. 48a. The rule is older than the doctrine of maintenance in English law. As Professor Ames in his Lectures on Legal History, 211, 212, pointed out the reason for the rule is in the fact that a chose in action always presupposes a personal relation between two individuals and that personal relation cannot be assigned. And see Pollock on Contracts, 5th Ed. 208; Holmes Common Law, 349, 341; 2 Spence Eq. Jur. 859. But the courts of equity always recognized the assignment of choses in action, and in England and in this country generally statutes have been passed which have modified the rule that choses in action are not assignable at law. So that now rights of action arising ex contractu and those arising ex delicto, but not for personal torts, are assignable. The right of action which the Lake Shore Company claimed to have for the damages it sustained by reason of the tortious acts of the defendants was assignable. In United Copper Securities Co. vs. Amalgamated Copper Co., 232 Fed., 574, 577, this court held that a right of action for property injuries based on a violation of the Sherman Act and brought under sec. 7 for treble damages is assignable.

But assuming that the right is assignable was there anything in the relations existing between the Lake Shore Company and the plaintiff which made it non-assignable as between them. It appears that a suit was brought in the District Court of the United States for the Northern District of Ohio to restrain the prosecution of any action based upon the assignment, it being claimed that the cause of action was non-assignable, and that relief was refused on the ground that if it were not assignable as claimed the defense was as available at law as at equity. This was carried on appeal to the Circuit
[21] Court of the Sixth Circuit which affirmed the court below. General Film Company vs. Sampliner, 252 Fed. 443.

While there is a liberty of contract, which in this country is protected by constitutional provision, yet the right of parties to make contracts may be in a measure restricted by the relations which exist between them as in the case of a trustee and cestui que trust, guardian and ward, parent and child, and attorney and client. The general rule of public policy which discountenances transactions between persons who are situated in a confidential relation towards each other

is regarded, as applying with particular force to attorneys at law, and they are restricted in dealing with those with whose interests they are entrusted. This is not only because they are officers of the court but also because of the fiduciary relation in which they stand to their clients and the great influence they exert over their minds. The courts in some cases have gone so far as to say that a gift from a client to his attorney during the continuance of the relation is absolutely void. These cases go not upon the ground of the inability of the client to make the gift, but upon the inability of the attorney to accept it. Holman vs. Loynes, 4 De G. M. & G. 270; Morgan vs. Minott, 6 Ch. Div. 638; Powell vs. Powell, (1900), 1 Ch. 243; Greenfield's Estate, 14 Penn. 489, 503. In other cases the gift has not been regarded as void ipso facto but it has been viewed with the greatest suspicion and the burden has been placed on the attorney to show the utmost good faith and freedom from all undue influence. Nesbit vs. Lockman, 94 N. Y. 167; Bolles vs. O'Brien, 63 Fla. 342, 354; Whipple vs. Barton, 63 N. H. 613.

The law is well settled that if an attorney purchases any property belonging to his client—not property which is at the time in litigation—the transaction is viewed with suspicion, and he assumes the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tainted with fraud or undue influence, and that the client acted upon the fullest information and advice. But when he acquires the title to property which is at the time in litigation or which is about to come into litigation it is a still more serious matter.

492 The common law from a very early period made it a crime designated as common barratry, to induce others to commence even just suits if done with an oppressive motive, and it punished the offender by fine and imprisonment. And by statute 12 Geo. I, c. 29, it was enacted that if one who was convicted of common barratry practiced as an attorney or solicitor in any suit he should be transported for seven years. And so the common law also punished as a crime the offense of maintenance which is described by Blackstone as "an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it." 4 Blackstone 135. This he declares is an offense against public justice, as it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression. Champerty, a species of maintenance, was also punished by the common law. "It signifies," Blackstone says, "the purchasing of a suit, or right of suing,—a practice so much abhorred by the law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretense to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, 'qui improbe count in alienam litem, ut quid ex condemnatione sperent, non ipsius rebutem fuerit inter eos communicentur, lege Julia de

a privata temeritate'. Those who knavishly interfere in other men's suits, for the purpose of sharing whatever may be awarded by the arbiter, are liable to the Julian law de vi privata: of secret influence); and they were published by the forfeiture of a third part of their goods, and perpetual infamy."

In Sherman's *Roman Law in the Modern World*, Vol. 2, p. 456, it is said: "An agreement with a client that remuneration for conducting his law suit should be a certain portion of the proceeds (Pactum de quota litis) was forbidden: an advocate making such an agreement was disbarred. This Roman prohibition, designed to uphold the honor of the legal profession, has exerted a strong influence in modern law." And see Mackenzie's Roman Law p. 406.

In maintenance no personal profit is expected or stipulated. The motive is simply to aid a party, with money or otherwise, to prosecute or defend his suit. Spicer v. Jarrett, 61 Tenn. 454, 457. And in champerty there is a bargain with the plaintiff or defendant by which the champertor is to carry on the suit at his own expense and is to derive some profit out of the thing sued for if he prevails. Roberts v. Cooper, 20 How., 467, 481. Breeden v. Frankford Marie, &c. Insurance Co., 220 Mo., 327. And see 11 C. J. 234. And a champertous agreement is of course void and unenforcible.

In Peck v. Heurich, 167 U. S., 624, 630 (1897), the Supreme Court declared that "according to the common law, as generally recognized in the United States, whatever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful and void, as tending to stir up baseless litigation."

The plaintiff contended in this court that as his assignor was not objecting to the validity of the assignment on the ground of inadequacy of consideration the objection certainly could not be raised by a third party. We may concede that ordinarily the validity of an assignment cannot be attacked by third parties on the ground of inadequacy of consideration. As between an assignor and an assignee the inadequacy of the consideration is sufficient to shock the conscience of a Chancellor it may be in some cases sufficient ground for setting a transaction aside. But the wrong in such cases is a private wrong to the assignor, and third parties are without standing to complain. And if assignor and assignee stand in a fiduciary relation there is still no right in third persons to allege the invalidity of the assignment solely on that ground. But the weakness of this contention in this case lies in the fact that the question here is not between the plaintiff and the defendants alone. If it were, the argument advanced might be conclusive. The question is one of public policy and upon that ground the decision rests. The plaintiff argued in this court and in the court below that the consideration for the assignment of the Lake Shore Company's cause of action was the extinguishment of a precedent debt due from the assignor and that therefore the assignment was valid and not champ-

pertous. If his premise is correct there is very respectable authority which would support his conclusion. Professor Ames in his Lectures on Legal History 258 note 1, states that "The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance while a similar grant to a purchaser or donee was maintenance. 34 Hen. VI 30, 15; 37 Hen. VI 13-3; 15 Hen. VII 2-3; South v. Marsh (1590), 3 Leon. 234; Harvey v. Beckman (1600), Noy 52. As late as 1667-1672 the same distinction prevailed also in equity."

In 1 Bacon's Abridg. 360, 361 referring to champerty it is said that "A grant of part of a thing in suit, made in consideration of a precedent debt is not within the meaning of the statute, but such only as is made in consideration of maintenance." And again, "But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain * * * are within the meaning of the statute."

In 11 C. J. 247 the law is stated as follows:

"A grant or assignment of an interest in the subject matter of the suit, made by the client to his attorney in consideration of a precedent debt, is not contrary to public policy or champertous. Nor is it made so by a statute which prohibits an attorney from buying a thing in action with intent to bring an action thereon; except in payment for services rendered."

495 In Tapley v. Coffin, 12 Gray (Mass.) 420 (1859), an attorney and client agreed that the attorney was entitled to $1,240 for past services and that he should have $400 in full satisfaction for future services in certain suits. And in order to secure the payment of these sums the client assigned to the attorney his share in his father's estate then under administration, and it was agreed that the attorney should collect and receive the same and after deducting the necessary expenses and sums of $1,240 and $400 pass over to the client the residue. The court sustained the legality of the agreement and said "It does not present a case of champerty or maintenance."

In Jordan v. Gillen, 44 N. H. 424 (1862), the client assigned to his attorney a cause of action sounding in tort the consideration being the discharge of a precedent debt due from the client to the attorney. The transaction was held to be not invalid and that the attorney would have the right to enforce the claim.

The New York Statute Laws of 1818 made the purchase of a chose in action by an attorney a ground of defense against a suit upon it, but where it was received bona fide in payment of an antecedent debt it was allowed by a proviso in the Statute. See Watson's Executors v. McLaren, 19 Wend. 557, 565 (1838), aff. in 26 Wend. 425.

But the difficulty with all this is that this court cannot accept the plaintiff's premise and hold that the consideration for this assignment was a precedent debt which was thereby extinguished. At the close of the plaintiff's case in the court below, when counsel for defendants rested and asked for the direction of a verdict, the plaintiff's counsel stated to the court the issue as follows: "The defence is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontra-

dicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona-fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation." This being the
496 issue as the plaintiff's counsel understood it and which was not controverted by defendants, the plaintiff and defendants each moved for a directed verdict in their favor. There was the plaintiff's testimony which if the court accepted it would have justified a finding that the cause of action was assigned for an antecedent indebtedness. There was other testimony from which a court might infer otherwise. No bill had ever been rendered by the plaintiff to the Lake Shore Company for the legal services the plaintiff says he rendered between July, 1908, and December, 1911, and no demand of payment had been at any time made. No entry had been made in the Lake Shore Company's minute book either of the making of this assignment or of a meeting of the directors at which this assignment was discussed or authorized. No disclosure of this assignment was made to the Mutual Film Company to which, in March 1912, the Lake Shore Company sold all its assets, notwithstanding the fact that the president of the latter company entered the employ of the Mutual Film Company as general manager at that time and remained with it in that capacity until March 1913. The above facts are disclosed by the testimony of the plaintiff's own witnesses. The weight to be given to the testimony and the inferences to be drawn from it were for the court to determine in view of the request made by each side to direct a verdict in their favor. This was equivalent to a request for a finding of fact and as the court directed the jury to find a verdict for one of them, both are concluded on the facts so found, Bentell v. Magone, 157 U. S. 154. In the case at bar the trial court said: "Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon." He accordingly directed a verdict for the defendants. This court is therefore not at liberty to review the trial court's findings of fact but is as much concluded as it would be by a verdict of the jury. Lehnen v. Dickson, 148 U. S. 71; Runkle v. Burnham, 153 U. S. 216. And we must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt but that he purchased it for the purpose of suing on it; that he, an attorney at law,
497 purchased from his client for $5,000 a cause of action which he values at $750,000. The question we must answer therefore is whether the law sanctions such a transaction between parties standing in the confidential relation of attorney and client. We are satisfied that the common law does not sanction it.

In Tyrrell v. Bank of London, 10 H. L. Cas. 26, 44, Lord Chancellor Westbury used language which this court heartily approves and gladly adopts. "There is no relation known to society," he said, "of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honorable observance, than the relation between solicitor and client; and I earnestly hope that this case will be one of the many which vindicate that rule of duty

which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect to the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled."

In 1823 Chief Justice Swift, of Connecticut, published Swift's Digest, a famous work in its time, and in vol. 2, p. 57 said that the purchase of a law suit by an attorney is champerty in its most odious form. And he added that "As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character to speculate in law suits."

It is said however that this assignment was made in Ohio; that the assignor was an Ohio corporation; that the assignee was domiciled in Ohio; that apparently there was at the time no intention of bringing suit on the assignment elsewhere than in Ohio; that whether the lex loci contractus or the lex loci solutionis is to determine the validity of the assignment that law in this case is the law of Ohio. There is no disagreement on either side on this phase of the subject. We have examined the cases in Ohio and we have been unable to discover that the question which this case presents has been passed upon by the courts of that State, or that there is anything in the statutes of the State or in the decisions of its
498 highest court which should lead us to think that by the law of that State the assignment is valid. The case of Reece v. Kyle, 49 Ohio St. 475 (1892), is certainly clearly distinguishable in its facts from the case at bar. The agreement the attorney and client made in that case involved an assignment by the client to the attorney of a judgment obtained by the attorney for the client it being agreed that the attorney should render legal services in an effort to collect the judgment and that he would advance costs and expenses involved in the proceeding, one-half of which was to be repaid by the client in case of failure, and in case of success the net proceeds of the judgment were to be equally divided between them. It is apparent that the assignment was for the purpose of security and to provide for the payment of the costs and expenses including the attorney fees. It does not appear what the proposition was between the consideration advanced by the attorney and the share of the judgment he was to receive as a fee. The agreement was held valid and not champertous. But the opinion of the court clearly indicates we think that it would not have sustained such an agreement as the one now in suit. For the court used the following language:

"The conduct of attorneys is subject to proper scrutiny by the courts. The maintenance of a high character for dignity and integrity on their part, is essential to the security of community, and the due administration of justice. Any infraction of the letter of this statute (the penal statute of February 10, 1824) would entail its penal consequences upon an offending attorney, and the courts would not hesitate to hold void any contract violative of its spirit, whether coming within the strict letter or not. So, too, the courts have been, and continue to be, careful not to sanction contracts which appear

to encourage a gambling spirit, one leading to the prosecution of pretended or obsolete claims, for a possible high reward."

In Davy v. The Fidelity & Casualty Inc. Co., 78 Ohio St. 256 (1908), the court held that while a contract for an attorney's fee contingent on the amount to be recovered is ordinarily valid in that State still if the contract is such as will prevent the client from settling his claim without the consent of the attorney it is champertous and voidable at the option of the client and its illegality will avail in any action against a third party which is based on the contract.

And the courts of Ohio hold that a contract is champertous and void where a client and his attorney agree that the latter may prosecute the suit in his own name and at his own risk and cost, and which deprives the client of the right to control or compromise the suit, and which gives the attorney a contingent fee to be deducted from the proceeds of the suit and is dependent upon the success thereof. Brown v. Ginn, 66 Ohio St. 346. See Stewards v. Welch, 41 Ohio St. 483; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 5; Railroad Company v. Volkart, 58 Ohio St., 362.

The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public the agreement is void even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted. Woodstock Iron Co. v. Richmond, &c. Extension Co. 129 U. S., 643; Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261; McGuire v. Corwine, 101 U. S. 108. As was said by Chief Justice Prentice in Connors v. Connolly, 86 Conn. 641, 656. "It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law books to the general tendency of such contracts." See Greenhood on Public Policy, p. 5 Richardson v. Crandall, 48 N. Y. 348. And Mr. Justice Field said in Providence Tool Company v. Norris, 2 Wall. 45. "The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country." It is enough that the contract belongs to a class which has a tendency contrary to the public good although in the particular instance no injury results. Palmbaum v. Magulsky, 217 Mass. 306, 308.

499 The general tendency of such agreements as the attorney and client made in this case is contrary to the public interests. The agreement concerns the administration of justice in the courts and it is made by an officer of the courts who undertakes to speculate in his client's suit. The attorney knows much better than his client can possibly know the value of a particular cause of action and the chances as to its successful prosecution in the particular case, and even if there is a full and honest disclosure to the client there are strong reasons which should forbid the purchase. It would be a gross impropriety in a judge to buy a law suit. The impropriety may be less in degree but it is none the less an impropriety for an attorney who is an officer of the court and a minister of justice to speculate in

the suits of his client. It would tend to impair public confidence in the profession and in the administration of justice itself.

Judgment affirmed.

501 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 21st day of December one thousand nine hundred and eighteen.

Present:

Hon. Henry Wade Rogers, Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit Judges.

JOSEPH SAMPLINER, Plaintiff in Error.

v.

MOTION PICTURE PATENTS COMPANY et al., Defendants in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H.W.R.

M.T.M.

502 Endorsed:

United States Circuit Court of Appeals, Second Circuit.
J. H. Sampliner
v.
Motion Picture Patents Co.
Order for Mandate.
United States Circuit Court of Appeals, Second Circuit.
Filed Dec. 23, 1918. William Parkin, Clerk.

503 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error (Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, Defendants in Error, (Defendants Below).

Petition for Rehearing.

Rogers & Rogers, Attorneys for Plaintiff-Appellant, 66 Broadway, Borough of Manhattan, New York City.
Gustavus A. Rogers, Saul E. Rogers, John G. White, C. A. Neff, Of Counsel.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jan. 28, 1919. William Parkin, clerk.

504 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error (Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, Defendants in Error, (Defendants Below).

Petition for Rehearing.

Rogers & Rogers, Attorneys for Plaintiff-Appellant, 66 Broadway, Borough of Manhattan, New York City.
Gustavus A. Rogers, Saul E. Rogers, John G. White, C. A. Neff, of Counsel.

505 *Table of Contents.*

	Page.
Introduction	1
Point 1. This Honorable Court, while holding with this petitioner on the law, held that the trial Court had made a finding of fact which made our law inapplicable, by which finding of fact this Honorable Court was bound	2
Point 2. The Trial Court had no legal authority to make any finding of fact at all	6
Point 3. The legal authority of the Trial Court to make a finding of fact was challenged by our exceptions and assignments of error	19
Point 4. The error on the part of the Trial Court was prejudicial	21
Point 5. The foregoing propositions being established, it follows that as a matter of logic the foundation of the decision made by this Honorable Court, by which this petitioner is aggrieved, is taken away, and the Court having indicated its agreement with our propositions of law, a rehearing should be granted	22

506 *Index of Cases.*

	Page
Bank vs. Maines, 183 Fed. 37	17
Bank vs. Weston, 161 N. Y. 520	10
Beuttell vs. Magone, 157 U. S. 154	7
Breakwater Co. vs. Donovan, 218 Fed. 340	12
Brown vs. Reinhardt, 210 N. Y. 162	10
Charlotte National Bank vs. Southern Railway Company, 179 Fed. 769	13, 18
Chesapeake & Ohio R. R. Co. vs. McKell, 209 Fed 514	13, 17
Empire State Cattle Company vs. Railway, 147 Fed. 457; 210 U. S. 1	7, 15
International Battery Co. vs. Westreich, 182 App. Div. 843	13
Lawton vs. Carpenter, 195 Fed. 362	18
Minahan vs. Grand Trunk Western Ry. Co., 138 Fed. 37	12
Perkins vs. Board of Commissioners, 80 O. S. 495	13
Sena vs. American Turquoise Co., 220 U. S. 497	7
Sigua Iron Co. vs. Greene, 88 Fed. 207	10
Southern Pacific Co. vs. U. S., 222 Fed. 46	13, 16
Stevens vs. Mutual Life Insurance Co., 183 App. Div. 629	18

507 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error (Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, Defendants in Error (Defendants Below).

Petition for Rehearing.

Now comes Joseph H. Sampliner, considering himself aggrieved by the decision of this Court heretofore filed herein, and respectfully petitions this Honorable Court for a re-consideration of said decision and a rehearing of his cause against the defendants.

Our grounds for asking a rehearing are as follows:

Point 1. This Honorable Court, while holding with this petitioner on the law, held that the trial Court had made a finding of fact which made our law inapplicable, by which finding of fact this Honorable Court was bound.

Point 2. The Trial Court had no legal authority to make any finding of fact at all.

508 Point 3. The legal authority of the Trial Court to make a finding of fact was challenged by our exceptions and assignments of error.

Point 4. The error on the part of the Trial Court was prejudicial.

Point 5. The foregoing propositions being established, it follows that as a matter of logic the foundation of the decision made by this Honorable Court, by which this petitioner is aggrieved, is taken away, and the Court having indicated its agreement with our propositions of law, a rehearing should be granted.

We shall discuss these grounds in the order of their statement.

Point 1.

This Honorable Court, while holding with this petitioner on the law, held that the trial court had made a finding of fact which made our law inapplicable, by which finding of fact this honorable court was bound.

We respectfully submit that it is fairly, if not conclusively, deducible from the opinion of this Honorable Court that the Court agreed with us upon our propositions of law, but held against us because it felt itself bound by a finding of fact made by the Trial

Court, there being some evidence in the opinion of this Honorable Court to sustain such finding.

We beg to re-state our positions and to quote the language of this Honorable Court in respect to them.

We argued that the cause of action of the Lake Shore Company against the defendants was assignable. In its opinion this Honorable Court says:

509 "The right of action which the Lake Shore Company claimed to have for the damages it sustained by reason of the tortious acts of the defendants was assignable."

We argued that the relationship of attorney and client between this petitioner and the Lake Shore Company, did not of itself preclude a valid assignment by the latter to the former of its cause of action against the defendants, and that inadequacy of consideration, if any, was not available to the defendants as a defense.

Upon these propositions this Honorable Court said that.

"Plaintiff contended in this Court that as his assignor was not objecting to the validity of the assignment on the ground of inadequacy of consideration, the objection certainly could not be raised by a third party. We may concede that ordinarily the validity of an assignment cannot be attacked by third parties on the ground of inadequacy of consideration. As between an assignor and an assignee, if the inadequacy of the consideration is sufficient to shock the conscience of the chancellor, it may be in some cases sufficient ground for setting the transaction aside. But the wrong in such cases is a private wrong to the assignor, and third parties are without standing to complain. And if the assignor and assignee stand in a fiduciary relation, there is still no right in third persons to allege the invalidity of the assignment solely on that ground. But the weakness of this contention in this case lies in the fact that the question here is not between the plaintiff and the defendants alone. If it were, the argument advanced might be conclusive. The question is one of public policy and upon that ground the decision rests."

At this point we may remark that it is apparent from the subsequent language of this Honorable Court that the question of
510 public policy to which the Court adverts is based wholly upon the finding of fact made by the Trial Court, with which we shall deal later in this argument.

We argued that the purchase by this petitioner from his client of its cause of action against the defendants was not champertous for the reason that it was for a pre-existing debt due from client to the attorney. Upon this point this Honorable Court said:

"The plaintiff argued in this Court and in the Court below that the consideration for the assignment of the Lake Shore Company's cause of action was the extinguishment of a precedent debt due from the assignor, and that therefore the assignment was valid and not champertous. If his premise is correct there is very respectable authority which would support his conclusion."

And this Honorable Court, after using this language, proceeds to quote a large number of authorities in support of the position taken by this petitioner. At this point we may say that the correctness or the incorrectness of the premise referred to by the Court depends wholly upon the finding of fact made by the Trial Court, and its relation to the questions before this Honorable Court, as will appear from later language used by this Honorable Court.

Having thus stated its position upon the principal substantive questions presented by the petitioner, this Honorable Court then proceeds:

"But the difficulty with all this is that this Court cannot accept the plaintiff's premise and hold that the consideration for this assignment was a precedent debt which was thereby extinguished. At the close of the plaintiff's case in the Court below, when counsel for defendants rested and asked the Court for a direction of the verdict, the plaintiff's counsel stated to the Court the issue as follows: 'The defense is that this plaintiff's title is void because he pur-
511 chased this cause of action with the intent to sue thereon. It now appears uncontradicted from the evidence that instead of having purchased this cause of action that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.' This being the issue, as the plaintiff's counsel understood it, and which was not controverted by defendants, the plaintiff and defendants each moved for directed verdict in their favor. There was the plaintiff's testimony, which, if the Court accepted it, would have justified a finding that the cause of action was assigned for an antecedent indebtedness. There was other testimony from which a Court might infer otherwise. (The Court proceeds to enumerate particular matters of evidence from which such contrary inference might be drawn.) The weight to be given to the testimony and the inferences to be drawn from it were for the Court to determine in view of the request made by each side to direct a verdict in their favor. This was equivalent to a request for a finding of fact, and as the Court directed the jury to find a verdict for one of them, both are concluded on the facts so found * * * he (the Court) accordingly directed a verdict for the defendants. This Court is therefore not at liberty to review the Trial Court's findings of fact, but is as much concluded as it would be by a verdict of the jury * * * and we must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt, but that he purchased it for the purpose of suing on it."

We believe we have demonstrated the accuracy of our headnote, and that while this Honorable Court agreed with us upon our substantive propositions of law, it held against us on the sole ground that it was concluded by a finding of fact made by the Trial Court which rendered our law inapplicable.

512 Point 2.

The Trial Court Had No Legal Authority to Make Any Finding of Fact at All.

Our proposition in support of this headnote is based upon the state of the record, which we believe clearly establishes the fact that it was the duty of the Trial Court to submit the case to the jury, and such being the duty of the Trial Court, that Court had no right to make a finding of fact, and therefore, the basic proposition on which this Honorable Court held against this petitioner is taken away.

Although both parties made motions for directed verdicts, this alone did not justify the Trial Court in treating the jury and a jury trial as waived where the party against whom the judgment is rendered requests the Court to submit the case to the jury on the questions of fact, as was done by petitioner's counsel in the Trial Court. The theory of this rule of procedure is that the making of a motion presumes that the maker intends to waive submission of the case to the jury, and where both parties make such motions there is a presumption by all parties interested, of a waiver of a jury trial. But where, however, after the making of such a motion the defeated party asks the Court to submit the case to the jury, the presumption is no longer obtainable, and the Court is required to submit the case to the jury in accordance with the request.

It is clearly settled that if both parties request a directed verdict and nothing more is done, the case is thereby submitted to the court and the only question left for the upper Court is one of law, and whether there was any evidence at all to support the finding of the lower court; in such a case the Court would respect the finding of the lower court in the same way and with the same respect which it ordinarily treats the finding of a jury. A leading case in
513 the Federal Courts on this point is

Beuttell vs. Magone, 157 U. S. 154 (1859).

The syllabus reads:

"When each party asks the court to instruct a verdict in his favor it is equivalent to a request for a finding of facts, and if the court directs the jury to find a verdict for one of them, both are concluded on the finding of facts."

Another more recent case dealing with the same proposition is

Sena vs. American Turquoise Company, 220 U. S. 497.

The Court in this case rested its opinion expressly upon the fact that both parties moved for a directed verdict, and "there was nothing more." The Court also cited Empire State Cattle Company vs Railway, infra, with approval, so that it is clear that this later decision did not in any way overrule or modify the principle laid down in that former decision.

Admitting this principle as settled, it is equally well established

that if either party asks to go to the jury either after or before the court has ruled on the motion to direct a verdict, the court must allow the case to go to the jury if there is any dispute as to a question of fact. The leading case in the Federal Courts on that subject is now

Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co., 210 U. S. 1 (1907).

In that case the syllabus reads:

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may
514 be drawn therefrom. Beuttell vs. Magone, 157 U. S. 154, distinguished."

The court said (pgs. 9 and 10):

"If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the case to the court, despite the fact that the plaintiffs asked special instruction upon the effect of the evidence then, as said in Beuttell vs. Magone, 157 U. S. 154, the facts having been thus submitted to the court, we are limited in reviewing its action, to a consideration of the correctness of the finding on the law and must affirm if there be any evidence in support thereof. If on the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope, that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in Beuttell vs. Magone, supra, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of Beuttell vs. Magone, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in Beuttell vs. Magone has been pointed out in sev-
515 eral recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth

Circuit, in Minalon vs. Grand Trunk Ry. Co., 138 Fed. Rep. 37, 41, and was also lucidly stated in the concurring opinion of Sibley, Circuit Judge, in McCormick vs. National City Bank of Waco, 142 Fed. Rep. 132, where, referring to Bentell vs. Magone, he said (p. 133):

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in Bentell vs. Magone, supra, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion. In New York there are many cases showing conformity to the practice announced in Bentell vs. Magone, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. Kirtz vs. Peck, 113 N. Y. 226, 8 C. 21 N. E. 130; Sutter vs. Vanderveer, 122 N. Y. 652, 8 C., 25 N. E. 967.

The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. Minalon vs. [illegible] 516 [illegible] G. T. W. Ry. Co. (C. C. A.), 138 Fed. Rep. 37."

From this it follows that the action of the trial court in giving the peremptory instructions to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiff.

This rule is equally well established by the highest court in the State of New York.

Brown vs. Reinhardt, 210 N. Y. 162 (1914).

In that case the syllabus reads:

"Where at the close of the evidence each party asks that a verdict be directed in his favor and after the decision thereon the unsuccessful party asks that the case be sent to the jury without stating any question of fact he desires submitted and he is not required by the court to state the specific question to the jury, such a denial of the motion is error."

See also Bank vs. Weston, 161 N. Y. 620 (1900).

This same rule has also been established for some time by the Circuit Court of Appeals for the Second Circuit.

Signa Iron Co. vs. Greene, 88 Fed. 297; C. C. A., 2nd Cir. (1898).

The syllabus reads:

"A party, by moving for the direction of a verdict, does not thereby waive any right he may have to go to the jury on questions of fact, and where both parties at the close of the evidence moved for the direction of a verdict, and both motions were denied, but the court, over the exception of one party, submitted a single issue of fact to the jury, such party is not estopped by his motion from assigning as error the failure of the court to submit the case generally."

The court said (pp. 210-211):

"The circumstance that a party, at the close of the case, moves the court to direct a verdict in his favor, does not, of course, operate to waive any right he may have to go to the jury. Such motion may be made, and most often is made, upon the theory that such controlling proposition of law would require a decision in the party's favor, although some or all of the disputed questions of fact were decided in his adversary's favor. But, if the court be not convinced as to the soundness of his proposition of law, he is none the less entitled to have his hearing before the trier of the facts upon any disputed material issues of fact in the case, unless in some way or other he waives his right, or leads the court to suppose that he concedes there is no material fact in dispute. In the supposition case stated above, where both sides move for a direction, and one motion is granted and the other denied, and the defeated party takes an exception only, without any suggestion that there is some material fact in dispute that should go to the jury, the court is entitled to assume that he concedes there is nothing material for the jury to pass upon. But the case at bar is a very different one from that to which the authorities are cited. The proofs being closed, both sides moved for the direction of a verdict, but the court denied both motions. Two dispositions of the case, and two only, were then possible. A juror might have been drawn, or the case given to the jury. When cases are given to juries, it is the usual practice to require them to give a general verdict upon all the evidence. Until they were in some way notified that a special verdict would be required, both sides, their motions being denied, were entitled to assume that the verdict was to be a general one on the whole case. Thereupon the court announced that it was going to leave one question only to the jury, namely, 'to find whether there was an agreement between the defendant and Smith, as trustee for the syndicate, by which Greene was to become an out and out purchaser of 1,000 shares, or whether it was, in substance, as the defendant claims, that he was only to take such shares as he could dispose of.' 'Then', added the court, 'when that finding is in the case, I will direct a verdict either one way or the other.' To this plaintiff duly excepted. When the court announced its decision to send only one question to the jury, it necessarily announced its decision to withdraw all other disputed material questions of fact from the consideration of the jury, and under the exception to such a disposition of the case plaintiff in error would be entitled to contend, as to any material question of fact, that it was improperly withdrawn from the jury. We find no force, therefore, in this preliminary objection."

There are also decisions establishing the same rule in practically every, if not every, circuit in the country. The cases which establish the doctrine most clearly are the following:

Breakwater Co. vs. Donovan, 218 Fed. 340; C. C. A., 6th Circ. 1914.

The syllabus reads:

"Where, after defendant's motion for a directed verdict was denied, plaintiff moved for a directed verdict, whereupon defendant insisted on the submission of issues of fact to the jury, there was no consent thereby to a submission of all the issues to the court."

Minahan vs. Grand Trunk Western Ry. Co., 138 Fed. 37; C. C. A., 6th Circ., 1905.

The syllabus reads:

"Where, in an action in which the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff, and the court permitted such requests to be filed, and assured counsel that he should have the benefit of them, such practice did not amount to a submission of the issues of fact to the
519 court so that plaintiff was precluded from objecting to an adverse finding thereon."

The most interesting and instructive part of the opinion of the court in this case was quoted by Chief Justice White in the Empire State Cattle case as appears in the quotation from that case supra.

See also:

Chesapeake & Ohio R. R. Co. vs. McKell, 209 Fed. 514; C. C. A., 6th Circ., 1913.

Southern Pacific Company vs. United States, 222 Fed. 46; C. C. A., 9th Circ., 1915.

Charlotte National Bank vs. Southern Railway Co., 179 Fed. 769; C. C. A., 4th Circ., 1910.

Perkins vs. Board of Commissioners, 80 O. S., 495.

International Battery Co. vs. Westreich, 182 App. Div. 843; 170 N. Y. Sup. 149, 1918.

The rule of law being established by the above authorities, it remains to be considered whether or not our case comes within the rule so laid down. In order to bring our case within the rule it is necessary that three things appear:—First, that the case was decided upon a question of fact by the court; second, that there was a sufficient request by the attorneys representing Mr. Sampliner to go to the jury; and, third, that a sufficient exception to the ruling of the court was saved and carried to this Honorable Court on error. The remarks of Judge Mayer leave no possible doubt on the first point. The court said explicitly (Record, p. 306, Fol. 1223):

"Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

I find as a fact also that the so-called assignment, plaintiff's Exhibit No. 1, was executed by the Lake Shore Company through its officers pursuant to action at a special meeting of the Board
520 of Directors.

Having thus disposed of the facts, I proceed to express, briefly, I trust, my views of the law of the case.

We now turn to the question whether or not Mr. Rogers, representing the plaintiff in error, made a sufficient request to go to the jury. On pages 304 and 305 of the Record Mr. Rogers said (Fol. 1218-1220):

"The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the court.

My understanding is that the question is one of law to be passed upon by the court from facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness."

It is especially worth while noting here that Mr. Rogers requested to go to the jury upon the exact question of fact which the court decided on the next page adversely to the plaintiff.

Again, on page 310 of the Record (Fol. 1239), Mr. Rogers said, after the court had made his ruling:

"I except to the direction, and also except to Your Honor's refusal to allow the case to go to the jury on the questions of fact if any there be."

The only fault which the court found with Mr. Rogers's requests to go to the jury was the fact that they were conditional and this would seem to be the only fault which could be found with them. It is necessary to consider, therefore, whether or not such a request is sufficient to preserve the plaintiff's rights. The case of
521 Empire State Cattle Company vs. Atchison, etc., Ry. Co., which has been cited above, was decided by the Circuit Court of Appeals for the Eighth Circuit in 147 Fed. 457 (1906). The court in that opinion stated what happened at the trial, as follows (p. 459):

"At the conclusion of the evidence the plaintiffs preferred a written request that the court direct a verdict in their favor and by a separate writing also asked that 13 other instructions directed to particular features of the case be given to the jury. The defendant likewise asked that a verdict be directed in its favor. After an extended consideration of both requests for a directed verdict the court denied the plaintiffs' and sustained that of the defendant. The special requests of the plaintiffs were denied. A verdict was accordingly returned for the defendant, and it had judgment.

This was clearly a conditional request upon the part of the plaintiff to go to the jury. The Circuit Court of Appeals held that the case had been submitted to the court and that there was no error in the court refusing to let it go to the jury. The court said (pp. 159-60):

"It is said, however, that by submitting the 13 requests for special instructions the plaintiffs showed their purpose not to so invoke the action of the court that they would be thereafter precluded from going to the jury. Some warrant for this contention may be found in the cases from the second circuit, in each of which it is recited either in the opinion or in the preceding statement that when the requests of both parties for a directed verdict were made neither of them requested that any question of fact should be submitted to the jury. The qualification, if it be one, suggested by these cases seems to have had its origin in a rule of practice obtaining in the state of New York, in which all of them arose. Sutter vs. Vanderveer, 122 N. Y. 652, 25 N. E. 907; Kirtz vs. Peck, 113 N. Y. 222, 21 N. E. 130; Koehler vs. Adler, 78 N. Y. 287. The Court of Ap-
522 peals of the Sixth Circuit came to a similar conclusion in Minahan vs. Railway, 138 Fed. 37, though the case there was peculiarly circumstanced. * * * * * * * * *

We are of the opinion that where both parties invoke the action of a trial court by requests for a directed verdict, and the request of one of them is accompanied, as in this case, or followed by requests for other instructions to the jury, such other requests do not, by themselves, amount to a withdrawal of the one for a directed verdict. The request for a directed verdict is first in insistence upon the attention and action of the court."

The Supreme Court, although it did not reverse this case, did hold as indicated by its language quoted above (pp. 9 and 10) that the ruling of the Circuit Court of Appeals was error and that there had been a sufficient request by the plaintiff to go to the jury. This case therefore very clearly establishes the rule in the Supreme Court of the United States that a request by a party to go to the jury, conditioned upon refusal of his own motion for a directed verdict, is a sufficient request to save such party's rights. There are some cases from the Circuit Court of Appeals of other circuits indicating that this rule is generally adopted in the Federal Courts.

Southern Pacific Co. vs. United States, 222 Fed. 46; C. C. A., 9th Circ., 1915.

The syllabus reads:

"The rule that a motion by each party for a directed verdict in his favor is equivalent to a request for findings of fact by the court, and that, if the court directs a verdict for one party, both parties are concluded on the findings of fact, was not applicable, where defendant's motion was accompanied by a request for leave to go to the jury if the motion was denied."

523 The court said (pp. 47-48):

"The case was tried before the court and a jury. At the close of the evidence the plaintiff moved for a directed verdict in its favor upon each of the causes of action here involved. A similar motion was made by the defendant, with the further request that, in case such motion be denied, it have leave to go to the jury. The motion of the plaintiff was granted, and that of the defendant, including the motion for leave to go to the jury, was denied. The rule that, where each party asks the court for a peremptory instruction for a directed verdict in his favor, the proceeding is equivalent to a request for a finding of facts by the court, and, if the court directs the jury to find a verdict for one of the parties, both are concluded on the findings of fact (Beuttell vs. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654), is not applicable here, in view of the additional motion of the defendant that in case its motion for a directed verdict in its favor be denied it have leave to go to the jury. Empire State Cattle Co. vs. Atchison Ry. Co., 210 U. S. 1, 8, 9, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70."

Bank vs. Maines, 183 Fed. 37; C. C. A., 6th Circ. 1910.

The syllabus reads:

"Where at the close of all the evidence in addition to requests for special instructions touching disputed facts in issue, both sides presented motions for a directed verdict, the court erred in treating the motion as a joint consent to submit the facts to the court."

Chesapeake & Ohio Railroad Co. vs. McKell, 209 Fed. 514; C. C. A., 6th Circ., 1913.

The syllabus reads:

"Requests by both parties for an instructed verdict do not amount to a withdrawal of all questions of fact from the jury, where it appears that such was not the intention of a party, and that it
524 was not so understood by the court."

It does not appear from the syllabus or from the opinion just what occurred at the trial, but the inference from the syllabus is that there will be error if a party has made his desire to go to the jury sufficiently clear so that the court could understand it. There was no possible doubt in our case but that the court understood that plaintiff wanted to go to the jury.

Charlotte National Bank vs. Southern Ry. Co., 179 Fed. 769; C. C. A., 4th Circ., 1910.

The court held as stated in the syllabus:

"Where both parties at the close of the testimony request peremptory instruction in their favor, but also at the same time ask for special charges to be given in the event that the peremptory requests are denied, some of them relating to conflicting evidence from which divergent inferences could be drawn, such peremptory requests do not affirm that there are no disputed questions of fact which should be submitted to the jury."

This case was cited with the approval of the Circuit Court of Appeals for the Fourth Circuit in Lawton vs. Carpenter, 195 Fed. 362, but was distinguished on the ground that there was in that case no request to go to the jury. The only case which has been observed so far which would seem to be against us on this point is a case in the appellate division of the Supreme Court of New York.

Stevens vs. Mutual Life Insurance Company, 183 App. Div. 629; 171 N. Y. Supp. 296 (1918).

In this case both parties moved for a directed verdict at the close of the evidence. The counsel for defendant, however, said:

525 "If that motion be denied it may be said there is no question of act here. We would reserve our right to go to the jury on the question of fact whatever it be."

Three judges held that this was not a sufficient request to make the action of the lower court error in refusing to let the case go to the jury. Two of the judges dissented from this holding. All the judges seemed to agree that there would have been error if there had been a sufficient request. The case has not yet been acted upon by the Court of Appeals. The case would, however, seem to be distinguishable on the ground that the defendant did not even make a conditional demand to go to the jury, but simply said that he reserved that right. If such a distinction is not valid, the case is certainly contrary to the rulings of the Federal Courts heretofore cited.

We believe we have demonstrated our second point, namely, that the Trial Court should have submitted the case to the jury, and therefore that it had no right to make that finding of fact upon which this Honorable Court based its decision.

Point 3.

The Legal Authority of the Trial Court to Make a Finding of Fact was Challenged by our Exceptions and Assignments of Error.

A brief reference to the record will, we believe, justify our headnote.

At pages 304-5 Folios 1216-17, counsel for petitioner, upon the trial, used this language:

"Well, if there are any questions of fact to be disposed of, Your Honor, I ask to go to the jury upon the questions of fact."

526 And at page 305, Folio 1219, he used this language:

"The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court. My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin

an action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness."

It is to be observed that the learned counsel asked to go to the jury not only upon the facts generally, but also upon the particular facts in respect to the very questions upon which the Trial Court's finding of fact compelled the adverse decision of this Honorable Court.

At page 310, Folio 1239, counsel for plaintiff excepted to the refusal of the Court to submit the case to the jury.

It would appear, therefore, that so far as the Trial Court was concerned, counsel for petitioner had fully protected his position with respect to the submission of the case to the jury, both upon the facts generally and upon the particular questions involved in the discussion before this Honorable Court.

At page 456, Folios 1822 and 1823, and on page 457, Folio 1828, being assignments of error 51 and 52, counsel for petitioner assign for error the action of the Trial Court in refusing to submit the case to the jury, and also the action of the Trial Court in making a finding of fact.

It would seem, therefore, that every step has been taken to put the questions we are now discussing fully and completely before this Honorable Court.

527

Point 4.

The Error on the Part of the Trial Court was Prejudicial.

Notwithstanding the certainty that the Trial Court committed error, it might be that such error would not justify the reversal of the case by this Honorable Court. Such would be the case if the state of the evidence was such as to require a new trial, on the ground that such verdict was against the weight of the evidence, if a verdict had been brought in by the jury in favor of the plaintiff below. In such a case the error of the Trial Court in refusing to submit the case to the jury, and in making a finding in favor of the defendants below, would be non-prejudicial. In all other cases, however, the error must necessarily be prejudicial, for it deprives a party of his constitutional right of trial by jury. The question remains, into which category does the case at bar fall. Upon this point we do not need to do more than refer this Honorable Court to its own language.

Referring to the testimony adduced on the trial on the issue as to whether the Lake Shore Company assigned its cause of action against the defendants to this petitioner for an antecedent indebtedness, or not, this Honorable Court said:

"There was the plaintiff's testimony, which, if the Court accepted it, would have justified a finding that the cause of action was assigned for an antecedent indebtedness."

If such testimony would have justified such a finding, clearly in the mind of this Honorable Court a finding in favor of this peti-

tioner could not have been disturbed as being against the weight of the evidence.

We assert, then, with confidence, that the error which we claim is found in the record, is prejudicial.

528 **Point 5.**

The Foregoing Propositions Being Established, it Follows that as a Matter of Logic the Foundation of the Decision Made by this Honorable Court, by which this Petitioner is Aggrieved, is Taken Away, and the Court Having Indicated its Agreement with our Propositions of Law, a Re-Hearing Should be Granted.

The statement of this point is almost, if not wholly, its own argument. This Honorable Court has said that a finding in favor of this petitioner would have been justified by the evidence. We believe we have demonstrated that the Trial Court had no right to make a finding of fact at all, and that we have challenged the finding made by the Trial Court at each step in the proceedings, and brought the question squarely before this Honorable Court. We believe that we have demonstrated that this Honorable Court based its decision wholly upon such erroneous finding of the Trial
529 Court, and we conclude, therefore, with the prayer that this Honorable Court grant to this petitioner a re-hearing of this cause and a re-consideration of its decision herein.

Respectfully submitted.

ROGERS & ROGERS,
Attorneys for Plaintiff-Appellant.

66 Broadway, Borough of Manhattan, New York City.

GUSTAVUS A. ROGERS,
SAUL E. ROGERS,
JOHN G. WHITE,
C. A. NEFF,
Of Counsel.

The undersigned, Gustavus A. Rogers and Saul E. Rogers, the attorneys for plaintiff in error, Joseph H. Sampliner, in the above entitled cause, hereby certify that the foregoing petition for rehearing, is, in our opinion, well founded and is not made for the purpose of delay.

ROGERS & ROGERS,
Att'ys for Plaintiff in Error.

530 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff-in-Error (Plaintiff Below),

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters, Defendants-in-Error (Defendants Below).

Before Rogers, Hough and Manton, Circuit Judges.

Rogers & Rogers, Attorneys for Plaintiff-in-Error.
Gustavus A. Rogers, Saul E. Rogers, John G. White, C. A. Neff, Joseph Walker Magrauth, Nathan Frankel, of Counsel.
Seabury, Massey & Lowe, Attorneys for Albert E. Smith and Vitagraph Company of America.
Samuel Seabury, William M. Seabury, Frank de R. Storey, of Counsel.
George F. Scull, Attorney and Counsel for Thomas A. Edison, Inc., Frank L. Dyer and William Pelzer.
Robert H. McCarter of Counsel.
531 Coudert Brothers, Attorneys for Jacques A. Berst and Pathe Freres.
Samuel Seabury, Charles B. Samuels, of Counsel.
Charles F. Kingsley, Attorney and Counsel for Motion Picture Patents Company, Jeremiah J. Kennedy, Harry N. Marvin, and Biograph Company.
Gifford, Hobbs & Beard, Attorneys for Kalem Company (Inc.).
Alfred P. W. Seaman, of Counsel.
Dwight McDonald, Attorney for Percival L. Waters.

ROGERS, *Circuit Judge:*

An application is made for a re-hearing in this case. The application must be denied and in denying it we shall state the ground of the application and the reason for denying it.

In our original decision we held that the plaintiff was not entitled to recover inasmuch as at the conclusion of the trial both sides had moved for the direction of a verdict, and the court acceding to the request had found as a fact that the plaintiff purchased this cause of action with intent to sue thereon. That having been found as a fact was decisive of the case, because the law in our opinion does not permit an attorney to maintain a cause of action which he has purchased from his client with intent to sue thereon.

The plaintiff however now applies for a re-hearing and
532 contends that the trial court had no legal authority to make any finding of fact at all.

It appears that after the defendants closed their case their counsel moved for the direction of a verdict on the ground that the plaintiff

had not shown title to this cause of action and also "on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void."

Thereupon counsel for the plaintiff asked whether the court cared to hear argument and was told that he did not as he had examined the brief on both sides and studied the case with great care. Then there followed at some length a colloquy between *between* Court and counsel only a portion of which need now be stated:

Mr. Rogers counsel for the plaintiff said:

"If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go."

He also said:

"But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court."

Thereupon the following occurred:

"The Court: Well, Mr. Rogers, you may either rest on the motion of defense and take an exception to such ruling as I make,
533 if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the question of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any "ifs." If you think under Section 973 of the Code, the Court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case.

Mr. Rogers: Then your Honor, may I state my position on the record?

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel

is at liberty, if so advised, to request to go to the jury and the Court will rule.

Mr. Rogers: Then I move for a direction, your Honor, for the plaintiff, upon the issue framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona
534 fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1 was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors."

The Court having thus disposed of the facts proceeded at some length to express his views of the law and concluded by directing a verdict for the defendants.

Thereupon the counsel for defendants said:

"I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be."

The jury then found a verdict in favor of the defendants as directed by the Court. The jury was then excused and the counsel for the plaintiff stated that he excepted to the verdict being received as the direction of a verdict in favor of the plaintiff was not authorized by the statute or the practice and that the Court's power was limited merely to declaring a non-suit.

It thus appears that counsel's position at the time was that there were no questions of fact on which to go to the jury, and that the question involved was a pure matter of law for the court to determine. This position, as the above extracts show, he re-iterated in the course of the ensuing discussion, saying again "My understanding is that the question is one of law to be passed upon by
535 the court from the facts adduced." In his application for a reargument he abandons that position, and relies upon the case of Empire State Cattle Co. v. Atchison, Topeka & Santa Fe Ry. Co., 210 U. S. 1 the syllabus of which he sets up as follows:

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to

have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom. Beattell v. Magone, 157 U. S. 154, distinguished."

The case recognizes the right of a party who has asked the court to direct a verdict to subsequently ask the court to have questions of fact submitted to the jury "where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom." But to make it error to refuse to allow the matter to go to the jury after asking for the direction of a verdict it is evident that there must be questions of fact which can be submitted. And counsel twice declared in most positive terms in open court that there were no such questions of fact, and in his petition he fails to state what the questions of fact are which a jury could pass upon. His exception is to the refusal to allow the case to go to the jury on the questions of fact "if any there be." If unable himself to state what possible questions of fact there were to be submitted to the jury he is in no position to ask for a reversal because of the judge to submit
536 what did not exist. After informing the court that "there aren't any questions of fact on which to go to the jury" he cannot ask this court to reverse the judge who was as unable as counsel to see what questions of fact remained for a jury to pass upon.

In Reis v. Rosenfeld 204 Fed. 282 this court held, Judge Lacombe writing the opinion, that where at the close of the case each side asked for the direction of a verdict and neither asked to go to the jury on the case generally, or on any question in it, this court would have to accept the findings of the trial court on all such questions.

In United States v. Two Baskets 205 Fed. 37 both sides moved the court to direct a verdict, and a verdict was directed in favor of the claimant, whereupon the Government excepted to such direction, but did not ask to go to the jury upon any question in it, and this court held, Judge Lacombe again writing the opinion, (the suit not being in equity or admiralty) that the Appellate Court must accept the findings of the trial court.

The above cases are consistent with the doctrine announced by the Supreme Court in the Empire State Cattle Company Case as we understand that case. And we are quite agreed that a request
537 preferred by both parties that the court direct a verdict is not in all cases conclusive so as to deprive a party of his right to have questions of fact submitted to the jury. We only hold that in order that the party may exercise that right there must be questions of fact to submit and that the parties are concluded as to the particular questions of fact which they have submitted to the court and upon which the court has made its findings.

And this court is not at liberty to review the findings upon the facts as the case is not in equity nor in admiralty but is in this court upon writ of error which brings up only errors of law.

Application denied.

538 [Endorsed:]

United States Circuit Court of Appeals, Second Circuit.
Joseph H. Sampliner, Plaintiff in Error,
against
Motion Picture Patents Company et al., Defendants in Error.
(Copy.)
Opinion.
Rogers, Circuit Judge.
Filed Feb. 3, 1919.

539 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 13th day of February, 1919.

Present:—
Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Hon Martin T. Manton,
Circuit Judges

JOSEPH H. SAMPLINER, Plaintiff in Error,
v.
MOTION PICTURE PATENTS COMPANY et al., Defendants in Error.

A petition for a rehearing having been filed herein by counsel for the Plaintiff in Error.
Upon consideration thereof it is
Ordered that said petition be and hereby is denied.

540 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error,
vs.
MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Elbert E. Smith, Percival Waters, Defendants in Error.

Petition for Writ of Error From the Supreme Court to the Circuit Court of Appeals for the Second Circuit.

To the Honorable Judges of the United States Supreme Court of Appeals for the Second Circuit.

Your petitioner, Joseph H. Sampliner, plaintiff in error in the above entitled cause, by his attorney, respectfully shows that the

above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a judgment was rendered therein on or about the 21st day of December, 1918, affirming a judgment of the District Court for the Southern District of New York on the verdict rendered upon the direction of the court on the issue of champerty, in favor of the defendants in error and for costs; that a petition for rehearing was denied by said Circuit Court of Appeals on or about February 13th, 1919; that the matter in
controversy in said suit exceeds One Thousand Dollars
541 ($1,000.00) besides costs; that the jurisdiction of neither of
the courts above mentioned is or was dependent in any wise upon the opposite parties of the suit or controversy, being aliens and citizens of the United States or citizens of different states; that this cause does not arise under the patent laws, or the copyright laws, or the revenue laws, or the criminal laws, and that it is not an admiralty case; that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, for the reason that the controversy involves, besides costs of the suit, a sum in excess of One Thousand Dollars ($1,000) and this controversy arises from an action to recover treble damages under Section 7 of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

And, therefore, your petitioner respectfully prays that a writ of error be allowed in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause, with all things concerning same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and, if error be found, corrected, according to the laws and customs of the United States.

Your petitioner in error further prays that an order be made fixing the amount of security which the plaintiff in error shall give and furnish upon the said writ of error, and that, upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

JOSEPH H. SAMPLINER,
By JOHN G. WHITE,
AUSTIN V. CANNON,
GUSTAVUS A. ROGERS,
SAUL E. ROGERS,
Attorney for Plaintiff in Error.

542 *Order.*

The foregoing petition for writ of error is hereby granted, and the amount of bond for such writ of error be and hereby is fixed at two hundred and fifty dollars.

HENRY WADE ROGERS,
Circuit Judge.

March 10, 1919.

Endorsed: United States of America. U. S. Circuit Court of Appeals for the Second Circuit. Joseph H. Sampliner, Plaintiff in Error, vs. Motion Picture Patents Company, et al., Defendants in Error. Petition for writ of error from the Supreme Court to the Circuit Court of Appeals for the Second Circuit. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 18, 1919. William Parkin, Clerk.

543 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error,

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jacques A. Berst, Albert E. Smith, Percival Waters, Defendants in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Circuit Court of Appeals.

Now comes the plaintiff in error, Joseph H. Sampliner, by his attorney, and says that in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to-wit:

(1) Said Circuit Court of Appeals erred in entering judgment affirming the action of the District Court for the Southern District of New York in entering judgment on the verdict rendered upon the direction of the court on the issue of champerty in favor of the defendants in error, and for costs.

(2) Said Circuit Court of Appeals erred in not reversing the judgment of the District Court for the Southern District of New York aforesaid, and in not ordering the said District Court to enter
544 judgment for the plaintiff in error upon the issue whether the assignment sued upon was champertous and void.

(3) Said Circuit Court of Appeals erred in not reversing the judgment of the District Court for the Southern District of New York aforesaid, and in not remanding said case to the District Court for a new trial upon the issue whether the assignment sued upon was champertous and void.

(4) Said Circuit Court of Appeals erred in holding that it was not at liberty to review the trial court's findings of fact, but was as much concluded by them as it would be by the verdict of a jury.

(5) Said Circuit Court of Appeals erred in holding that the District Court found that the consideration for the assignment in question was not a precedent debt which was thereby extinguished.

(6) Said Circuit Court of Appeals erred in holding that there was any evidence to support the finding of the District Court (if said District Court did so find) that the consideration for the assignment in question was not a precedent debt which was thereby extinguished.

(7) Said Circuit Court of Appeals erred in holding that there was any evidence to support the findings of the District Court that the plaintiff in error purchased this cause of action with intent to sue thereon.

(8) Said Circuit Court of Appeals erred in holding that an attorney who has rendered to his client services indisputably worth many thousands of dollars must forego remuneration because his client is unable to pay him in cash and may not accept from his client, at the suggestion of his client, a valid claim which his client has against a third person in payment of such services.

545 (9) Said Circuit Court of Appeals erred in holding that if an attorney accepts an assignment of a chose in action in payment for his past services, that the party against whom the claim, valid in itself, exists, may escape liability merely by reason of the fact that the claim ultimately proved to be worth more than the attorney's bill for services, although the client who assigned the claim raises no objection whatever upon this or any other ground and no creditor of the client was in any way prejudiced by the assignment.

(10) Said Circuit Court of Appeals erred in holding that an assignment of a chose in action is champertous and void if taken by the assignee with intent to sue thereon, even though such assignee intends to settle, compromise or collect the claim in any other way and intends to bring suit only as a last resort.

(11) Said Circuit Court of Appeals erred in holding that an assignment to an attorney may be champertous, although an assignment under the same circumstances to a person not an attorney would not have been champertous.

(12) Said Circuit Court of Appeals erred in holding that an assignment of a chose in action is champertous and void if taken by the assignee with intent to sue thereon, even though the consideration for said assignment was a valid pre-existing claim for services rendered.

(13) Said Circuit Court of Appeals erred in that, while it held that the assignment in question was not tainted with either champerty or maintenance, and that no objection to the validity of the assignment was made by the assignor, that said assignment was yet void as being contrary to public policy.

546 (14) Said Circuit Court of Appeals erred in denying the petition for re-hearing of the plaintiff in error herein.

(15) Said Circuit Court of Appeals erred in holding that the attorney for plaintiff in error did not make a sufficient request to have the issues of fact submitted to the jury.

(16) Said Circuit Court of Appeals erred in holding (if it did so hold) that there were no questions of fact to be submitted to the jury and that the undisputed evidence showed that the assignment in question was champertous.

(17) Said Circuit Court of Appeals erred in holding that if both parties move for a directed verdict and at the same time one of the parties requests to go to the jury if his motion is denied, such party has not made a sufficient request to entitle him to have the issues of fact submitted to the jury.

(18) Said Circuit Court of Appeals erred in holding that if both parties move for a directed verdict and the motion of one of the parties is granted, the other party is not then entitled to ask to have the questions of fact submitted to the jury.

Wherefore, the said Joseph H. Sampliner, plaintiff in error, prays that, for the errors aforesaid and other errors appearing in the record of the United States Circuit Court of Appeals in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the District Court for the Southern District of New York with instructions to enter judgment for the plaintiff in error on the issue whether the assignment sued upon was champertous and void, or that a new trial may be granted.

JOHN G. WHITE,
AUSTIN V. CONNOR,
GUSTAVUS A. ROGERS,
SAUL E. ROGERS,
Attorneys for Plaintiff in Error.

547 Endorsed: United States of America U. S. Circuit Court of Appeals for the Second Circuit. Joseph H. Sampliner, Plaintiff in Error, vs. Motion Picture Patents Company et al., Defendants in Error. Assignment of errors on writ of error from the Supreme Court of the United States to the Circuit Court of Appeals. United States Circuit Court of Appeals Second Circuit. Filed Mar. 18, 1919. William Parkin, clerk.

548 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. SAMPLINER, Plaintiff in Error,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, Defendants in Error.

Know All Men By These Presents That the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and having an office and principal place of business for the State of New York at No. 120 Broadway, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, in the sum of Two Hundred and Fifty Dollars ($250.), to be paid to the said Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, their legal representatives or assigns, for the payment of which, well and truly to be made, it binds itself and its successors, firmly by these presents.

Sealed with its seal, and dated this 11th day of March, 1919.

Whereas, Joseph H. Sampliner has appealed to the Supreme Court of the United States from a final order, judgment or decree of the United States Circuit Court of Appeals for the Second Circuit, filed in the office of the Clerk of said United States Circuit Court of Appeals on the 21st day of December, 1918, affirming with cost the judgment of the United States District Court for the Southern District of New York, on the verdict rendered upon the direction of the Court on the issue of champerty, in favor of the defendants in error and for costs.

Now, therefore, the condition of this obligation is such that if the said appellant, Joseph H. Sampliner, shall prosecute his said appeal to effect and answer all damages and costs, if he shall fail to make said plea good, then this obligation to be void; otherwise to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.
By JAMES R. KINGSLEY,
Attorney-in-Fact.

Attest:
FRANK A. EICKHOFF,
[SEAL.] *Attorney-in-fact.*

549 STATE OF NEW YORK,
County of New York, ss:

On the 11th day of March, in the year 1919, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said James R. Kingsley further said that he is acquainted with Frank A. Eickoff and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Frank A. Eickoff subscribed to the within instrument, was in the genuine handwriting of the said Frank A. Eickhoff and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

[SEAL.] F. A. MASSEY,
Notary Public, New York County. 267
N. Y. Co. Reg. 9076.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kingsley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank A. Eickhoff, all of the City of New York, State of New York, be and each of them is hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds or undertakings required or permitted in all actions or proceedings, or by law required, permitted or allowed.

"Such bonds or undertakings to be executed for the Company by any one of the said Henry B. Platt, James R. Kingsley, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require."

County of New York, ss:

I, Frank A. Eickhoff Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 11th day of March, 1919.

FRANK A. EICKHOFF,
Attorney-in-Fact.

[SEAL.]

Fidelity and Deposit Company of Maryland.

Statement December 31, 1918.

Assets.

Home Office Building and Annex		$ 2,500,000.00
Other Real Estate		58,284.09
Bonds and Stocks (Insurance Department Valuations)		6,546,785.00
First Mortgage Loans, etc.		248,857.14
Unpaid Premiums, (subsequent to Oct. 1, 1918)		645,667.08
Unpaid Premiums, (prior to Oct. 1, 1918)		481,627.03
Bank Deposits for use of Branch Offices, etc.		82,267.19
Cash in Banks and Trust Companies		988,828.81
Total Assets		11,552,316.34
(Assets deducted according to ruling and regulations of various Insurance Departments, etc.)		
Unpaid Premiums, (prior to Oct. 1, 1918)	$481,627.03	
Net Amount of Special Deposits made under laws of various States, etc.	289,743.88	771,370.91
Total Assets (on basis of statement to Insurance Departments, etc.)		$10,780,945.43

Liabilities.

Reserved for Unearned Premiums		$2,437,213.36
Reserve for Claims		2,346,939.74
Reserve for Advance Premiums and Return Premiums		242,179.02
Reserve for Commissions (Unpaid Premiums subsequent to Oct. 1, 1918)		74,576.71
Reserve for Taxes, and Expenses in Transit		277,230.43
Reserve, Special and Contingent		522,102.64
Reserve for Unpaid Reinsurance Premiums		158,685.93
Capital Stock, Paid up	$3,000,000.00	
Surplus and Undivided Profits	$2,493,388.51	
Less amount deducted, according to Insurance Department regulations (See above)	771,370.91	
Surplus and Undivided Profits (on basis of statement to Insurance Departments, etc.)	1,722,017.60	4,722,017.60
		$10,780,945.43

STATE OF NEW YORK,
County of New York, ss:

Frank A. Eickhoff, being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of the said Company, as of December 31, 1918, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

FRANK A. EICKHOFF.

Subscribed and sworn to before me, this 11th day of March, 1919.

F. A. MASSEY,
Notary Public, New York County. 367. [SEAL.]

550 Endorsed.

United States Circuit Court of Appeals for the Second Circuit.
Joseph H. Sampliner, Plaintiff in Error,
against
Motion Picture Patents Company et al., Defendants in Error.
Bond.
Copy.

I approve of the within Bond and of the sufficiency of the surety therein.

Dated March 11, 1919. HENRY WADE ROGERS,
U. S. Circuit Judge.

Fidelity and Deposit Company of Maryland, 120 Broadway, New York.

United States Circuit Court of Appeals Second Circuit Filed Mar. 18, 1919. William Parkin, Clerk.

551 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 550 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Joseph H. Sampliner against Motion Picture Patents Company et al., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 22d day of March in the year of our Lord One Thousand Nine Hundred and nineteen and of the Independence of the said United States the One Hundred and forty-third.

WM. PARKIN,
Clerk.

[SEAL.]

552 Supreme Court of United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judge of the United States Circuit Court of Appeals, Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Joseph H. Sampliner, plaintiff in error, and Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E.

Smith, Percival Waters, defendants in error, a manifest error hath happened, to the great damage of the said Joseph H. Sampliner, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the 10th day of April, next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done
553 therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States of America, the one hundred and forty-third.

WM. PARKIN,
Clerk of United States Circuit Court of Appeals for Second Circuit.

Allowed by:
HENRY WADE ROGERS,
United States Circuit Judge.

554 [Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Mar 18 1919. William Parkin, Clerk.

555 United States Supreme Court.

UNITED STATES OF AMERICA, ss:

JOSEPH H. SAMPLINER, Plaintiff in Error,
vs.
MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, Defendants in Error.

To Motion Picture Patents Company, Vitagraph Company of America, Biograph Company, Thomas A. Edison, Inc., Kalem Company, Pathe Freres, Frank L. Dyer, Harry N. Marvin, Jeremiah J. Kennedy, William Pelzer, Jaques A. Berst, Albert E. Smith, Percival Waters, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, on the 10th day of April, next, pursuant to an order allowing a writ of error filed in the

Clerk's office of the Circuit Court of Appeals of the United States for the second circuit, from a final judgment signed, filed and entered on the twenty-first day of December, 1918, in that cer-
556 tain suit, being at law No. 13, wherein Joseph H. Sampliner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said order allowing writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 11th day of March in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States of America the one hundred and forty-third.

HENRY WADE ROGERS,
Judge of the Circuit Court of Appeals, Second Circuit.

Service of the above citation, writ of error and bond, is hereby acknowledged and appearance is hereby entered.

GEORGE F. SCULL,
Attorney for Edison, Dyer, Pelzer.
COUDERT BROTHERS,
Attorneys for Pathe Freres and Rent.
GIFFORD, HOBBS & BEARD,
March 14, 1919. *Attorneys for Kalem & Co.*
CHARLES I. KINGSLEY,
Att'y M. P. P. Co. et al., for Hall, Marvin, J. J. Kennedy & Biograph Co.
SAMUEL SEABURY AND
WILLIAM SEABURY,
Att'ys for Vitagraph Co. of America
March 17, 1919. *and Albert E. Smith.*
DWIGHT MACDONALD,
March 14, 1919. *Att'y for P. Waters.*

557 [Endorsed:]

United States Supreme Court.
Joseph H. Sampliner, Plaintiff in Error,
vs.
Motion Picture Patents Company et al., Defendants in Error.
Citation.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Mar 18 1919 William Parkin, Clerk.

Endorsed on cover: File No. 27,036. U. S. Circuit Court Appeals, Second Circuit. Term No. 340. Joseph H. Sampliner, plaintiff in error, vs. Motion Picture Patents Company, Vitagraph Company of America, Biograph Company et al. Filed March 31, 1919. File No. 27,036.

Office Supreme Court, U. S.
FILED
MAY 22 1919
JAMES D. MAHER,
Clerk.

In the Supreme Court of the United States

No. [redacted] October Term, 1918.

[redacted]89

JOSEPH H. SAMPLINER,
Petitioner,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, THOMAS A. EDISON, INC., KALEM COMPANY, PATHE FRERES, FRANK L. DYER, HARRY N. MARVIN, JEREMIAH J. KENNEDY, WILLIAM PELZER, JACQUES A. BERST, ALBERT E. SMITH, PERCIVAL WATERS,
Respondents.

PETITION FOR LEAVE TO PROSECUTE PETITION IN ERROR WITHOUT PREPAYMENT OF FEES AND COSTS.

JOHN G. WHITE,
AUSTIN V. CANNON,
GUSTAVUS A. ROGERS,
SAUL E. ROGERS,
Attorneys for Plaintiff in Error, Petitioner.

In the Supreme Court of the United States

No. 950 of October Term, 1918.

JOSEPH H. SAMPLINER,
Petitioner,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, THOMAS A. EDISON, INC., KALEM COMPANY, PATHE FRERES, FRANK L. DYER, HARRY N. MARVIN, JEREMIAH J. KENNEDY, WILLIAM PELZER, JACQUES A. BERST, ALBERT E. SMITH, PERCIVAL WATERS,
Respondents.

PETITION FOR LEAVE TO PROSECUTE PETITION IN ERROR WITHOUT PREPAYMENT OF FEES AND COSTS.

JOHN G. WHITE,
AUSTIN V. CANNON,
GUSTAVUS A. ROGERS,
SAUL E. ROGERS,
Attorneys for Plaintiff in Error, Petitioner.

In the Supreme Court of the United States

No. 950 of October Term, 1918.

JOSEPH H. SAMPLINER,

Petitioner,

against

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, THOMAS A. EDISON, INC., KALEM COMPANY, PATHE FRERES, FRANK L. DYER, HARRY N. MARVIN, JEREMIAH J. KENNEDY, WILLIAM PELZER, JACQUES A. BERST, ALBERT E. SMITH, PERCIVAL WATERS,

Respondents.

PETITION FOR LEAVE TO PROSECUTE PETITION IN ERROR WITHOUT PREPAYMENT OF FEES AND COSTS.

To the Honorable Supreme Court of the United States:

The petition of Joseph H. Sampliner respectfully shows to this Honorable Court:

1. Your petitioner filed his complaint in this case in the United States District Court for the Southern District of New York on the 18th day of January, 1917, relying upon an assignment to him from The Lake Shore Film & Supply Company of a cause of action against the respondents, and others, for treble damages under the Sherman Anti-Trust Law. The defendants interposed two affirmative defenses;

(1) The statute of limitations, and,

(2) Champerty.

In pursuance of an order of the District Court, the issue of champerty was tried separately, and upon trial the testimony was given on behalf of the plaintiff only.

2. The undisputed evidence, because the only evidence which was introduced, establishes that the plaintiff had been an attorney, practising in Ohio for about twenty-five years; that The Lake Shore Film & Supply Company was an Ohio corporation; that the plaintiff had a just claim for legal services rendered for $10,000.00, for which he was willing to take $5,000.00 in cash, on account of the financial condition of his client; that plaintiff's client, The Lake Shore Film & Supply Company, was without means to pay him and was without means to enforce the claim here in suit; that plaintiff's client suggested to him that they would assign their claim against the respondents, and others, for damages in its business because of violations of the Sherman Anti-Trust Law in payment of his claim for services; that plaintiff took time to consider this offer and later accepted it and cancelled his bill for fees in consideration of the absolute transfer of the whole claim here in suit; that the plaintiff hoped for a settlement from the respondents, without suit, but meant to sue if no settlement could be obtained; that the assignor has made no complaint, but is satisfied with the assignment to the plaintiff; and that no creditor of the client was in any way prejudiced by the assignment. After the assignment to petitioner, the Government instituted an equity suit against the defendants herein, now defendants in error, and they were adjudged to be an unlawful combination in restraint of interstate commerce under the Sherman Act, and were enjoined from continuing

such combination. *United States vs. Motion Picture Patents Company, et al.*, 225 Fed. 800.

3. At the close of the plaintiff's case the defendant rested, and both parties moved for a directed verdict. The plaintiff, however, qualified his request for a directed verdict by requesting the Court to allow the case to go to the jury in case his motion was denied. The Court overruled the plaintiff's motion and granted the motion of the defendants, finding

> "that the plaintiff purchased this cause of action with intent to sue thereon."

and held as a matter of law that the assignment was therefore champertous. The plaintiff excepted to the granting of the defendants' motion to direct a verdict, and also excepted to the refusal of the Court to allow the case to go to the jury.

4. Your petitioner prosecuted error to the Circuit Court of Appeals for the 2nd Circuit, and that Court affirmed the judgment of the District Court on the ground that it was

> "not at liberty to review the trial court's findings of fact but is as much concluded as it would be by the verdict of the jury." (Opinion of Judge Rogers.)

Your petitioner thereupon filed a petition for rehearing on the ground that the trial court had no legal authority to make any finding of fact under the rule established by this Court in the *Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1.

The Court denied the petition for a re-hearing, saying:

> "But to make it error to refuse to allow the matter to go to a jury after asking for the direction of a verdict it is evident that there must be questions

of fact which can be submitted." (Opinion of Judge Rogers, denying petition for re-hearing.)

5. A writ of error was thereupon prosecuted by your petitioner to this Court, and your petitioner is herein asking permission to prosecute the same without the prepayment of fees and costs.

Your petitioner respectfully submits that manifest error has intervened to his prejudice in this, to-wit:

(1) The Circuit Court of Appeals erred in holding that there was any evidence to support the findings of the District Court that your petitioner purchased this cause of action with intent to sue thereon.

(2) The Circuit Court of Appeals erred in holding that an attorney who has rendered to his client services indisputably worth many thousands of dollars must forego remuneration because his client is unable to pay him in cash and may not accept from his client, at the suggestion of his client, a valid claim which his client has against a third person in payment of such services.

(3) The Circuit Court of Appeals erred in holding that if an attorney accepts an assignment of a chose in action in payment for his past services, that the party against whom the claim, valid in itself, exists, may escape liability merely by reason of the fact that the claim ultimately proved to be worth more than the attorney's bill for services, although the client who assigned the claim raises no objection whatever upon this or any other ground and no creditor of the client was in any way prejudiced by the assignment.

(4) The Circuit Court of Appeals erred in holding that an assignment of the chose in action is champertous and void if taken by the assignee with intent to sue thereon, even though such assignee intends to settle, compromise or collect the claim in any other way and intends to bring suit only as a last resort.

(5) The Circuit Court of Appeals erred in holding that an assignment to an attorney may be champertous, although an assignment under the same circumstances to a person not an attorney would not have been champertous.

(6) The Circuit Court of Appeals erred in holding that an assignment of a chose in action is champertous and void if taken by the assignee with intent to sue thereon, even though the consideration for said assignment was a valid pre-existing claim for services rendered.

(7) The Circuit Court of Appeals erred in that, while it held that the assignment in question was not tainted with either champerty or maintenance, and that no objection to the validity of the assignment was made by the assignor, that said assignment was yet void as being contrary to public policy.

(8) The Circuit Court of Appeals erred in holding that if both parties move for a directed verdict and at the same time one of the parties requests to go to the jury if his motion is denied, such party has not made a sufficient request to entitle him to have the issues of fact submitted to the jury.

(9) The decisions of the District Court and the Circuit Court of Appeals are contrary to the holding of this Court in *Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1 (1907) in which the rule was established that,

> "The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting."

(10) The District Court and the Circuit Court of Appeals have held that a request to go to the jury, which is conditioned upon the refusal of the requestor's motion for a directed verdict, is not a sufficient request to bring into operation the rule in the *Empire State Cattle Company case*, 210 U. S. 1. This holding is in direct opposition to the holding of the Supreme Court in said case and is in direct opposition to the holding of the Circuit Court of Appeals for the 9th Circuit; *Southern Pacific Co. vs. U. S.*, 222 Fed. 46; C. C. A. 9th Ct. 1915; and the holding of the Circuit Court of Appeals for the 6th Circuit, *Bank vs. Maines*, 183 Fed. 37; C. C. A. 6th Ct. 1910; *Chesapeake & Ohio R. R. Co. vs. McKell*, 209 Fed. 514; C. C. A. 6th Ct. 1913; and to the holding of the Circuit Court of Appeals for the 4th Circuit, *Charlotte National Bank vs. Southern Ry. Co.*, 179 Fed. 769; C. C. A. 4th Ct. 1910.

And other errors more specifically set forth in the assignment of errors filed in this case.

Your petitioner further shows that because of his poverty he is unable to pay the costs and fees on the writ of error above mentioned or to give security for the same; that on the 15th day of October, 1918, he was adjudged a bankrupt in the United States District Court for the Northern District of Ohio, Eastern Division; that he is still entirely without funds or property to pay the costs or fees or to obtain security for the payment of them; that no attorney or any other person has any interest in the claim represented by said writ of error either contingent or otherwise; that on the 6th day of May, 1919, it appearing that there were no funds in the hands of your petitioner's trustee in bankruptcy for the prosecution of the above mentioned writ of error, upon the application of said trustee, it was ordered that he abandon

and reject the claim represented by the above mentioned writ of error, and said claim has been abandoned and rejected by said trustee. Your petitioner believes that he is entitled to the redress he seeks by the above mentioned writ of error.

Wherefor, your petitioner respectfully prays that he may be allowed to prosecute the above mentioned writ of error without prepayment of, or furnishing security for the costs and fees thereof.

JOSEPH H. SAMPLINER,
Petitioner.

UNITED STATES OF AMERICA,
STATE OF OHIO,
CUYAHOGA COUNTY, SS:

Joseph H. Sampliner, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge.

JOSEPH H. SAMPLINER.

Sworn to before me and subscribed in my presence by the said Joseph H. Sampliner this 9th day of May, 1919.

HOWARD F. BURNS,
(Seal) *Notary Public.*

CLERK'S CERTIFICATE.

THE STATE OF OHIO,
CUYAHOGA COUNTY, ss.

I, Edmund B. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid, do hereby certify that Howard F. Burns, before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires March 7th, 1920.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 10th day of May, A. D. 1919.

No. 11481 EDMUND B. HASERODT, *Clerk.*

Common Pleas Court

(Seal)

Cuyahoga County, Ohio.

UNITED STATES OF AMERICA,
STATE OF OHIO,
CUYAHOGA COUNTY, ss.

Joseph H. Sampliner, being duly sworn, deposes and says that he is plaintiff in error in the case of Joseph H. Sampliner, plaintiff in error, against The Motion Picture Patents Company, et al., defendants in error, being Case No. 950 of the October Term, 1918, on the docket of the Supreme Court of the United States; that because of his poverty he is unable to pay the costs and fees for the prosecution of the writ of error above mentioned, or to give security for the same; that on the 15th day of October, 1918, he was adjudged a bankrupt in the United States District Court for the Northern District of Ohio, Eastern Division; that he is still entirely without funds or property to pay the costs or fees or to obtain security for the payment of them; that no attorney or any other person has any interest in the claim represented by said writ of error, either contingent or otherwise; that on the 6th day of May, 1919, it appearing that there were no funds in the hands of your petitioner's trustee in bankruptcy for the prosecution of the above mentioned writ of error, upon the application of said trustee, it was ordered that he abandon and reject the claim represented by the above mentioned writ of error, and said claim has been abandoned and rejected by said trustee, and that he believes he is entitled to the redress he seeks by the above mentioned writ of error.

JOSEPH H. SAMPLINER.

Sworn to before me and subscribed in my presence by the said Joseph H. Sampliner, this 9th day of May, 1919.

HOWARD F. BURNS,
Notary Public.

(Seal)

Supreme Court, U. S.
FILED
MAR 22 1919
JAMES D. MAHER,
CLERK.

No. [redacted]89

In the Supreme Court of the United States

OCTOBER TERM, 1918.

JOSEPH H. SAMPLINER,
Plaintiff in Error,
(Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY,
VITAGRAPH COMPANY OF AMERICA,
BIOGRAPH COMPANY,
THOS. A. EDISON, INC.,
KALEM COMPANY,
PATHE FRERES,
FRANK L. DYER,
HARRY H. MARVIN,
JEREMIAH J. KENNEDY,
WILLIAM PELZER,
JACQUES A. BERST,
ALBERT E. SMITH and
PERCIVAL L. WATERS,
Defendants in Error,
(Defendants Below).

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN G. WHITE,
AUSTIN V. CANNON,
Attorneys for Plaintiff in Error.

(27,636)

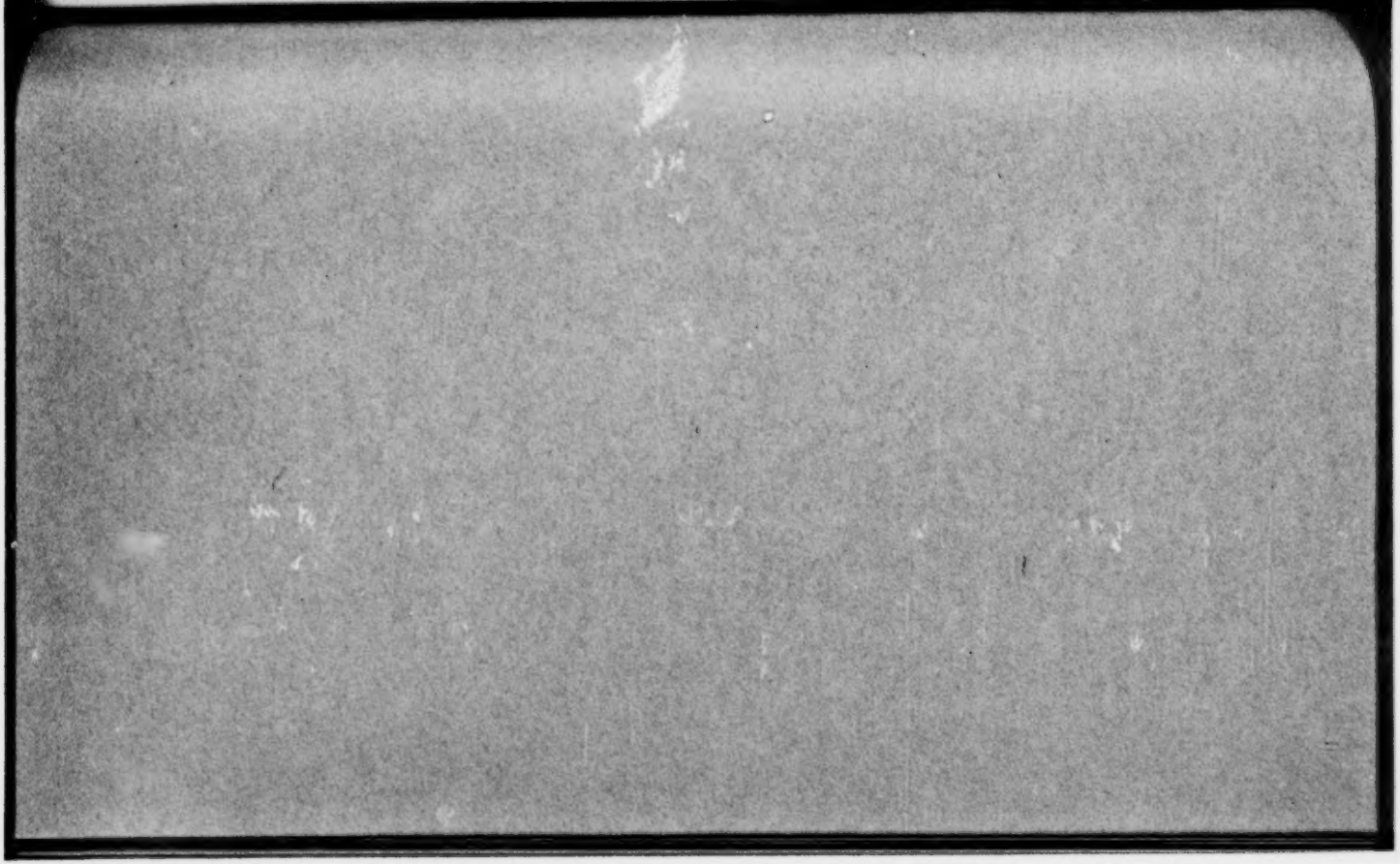


TABLE OF CONTENTS.

Statement of Case 1

The Law of the Case:

I. There was no substantial evidence in support of the illegality of the assignment and the trial court should have directed a verdict for the plaintiff upon this issue 22

The assignment was not void, either as a purchase of a contentious or litigious claim, nor as maintenance nor as champerty, or in violation of any other rule of law 32

A. It was not void as a purchase of a contentious or litigious claim 32

B. It was not void for maintenance or champerty, either by the law of Ohio or by the general law 37

Is there any general policy of law growing out of the relations between attorney and client which, under the evidence in this case, invalidates this transfer? 43

Is this claim assignable? 50

II. If there were any questions of fact to be decided or divergent inferences of fact to be made the District Court erred in not submitting them to the jury 53

A. The fact that each party moves for a directed verdict does not deprive either party of the right to have questions of fact submitted to the jury .. 54

B. The plaintiff in error made a sufficient request to have the case submitted to the jury 59

C. The failure to submit the case to the jury was prejudicial to the plaintiff in error 65

D. A sufficient exception to the action of the District Court was preserved and is presented to this Court 65

Conclusion 67

Authorities Cited.

Arden vs. Patterson, 5 Johns. Ch. 44.....25, 42
Bank vs. Maines, 183 Fed. 37; C. C. A., 6th Cir., 1910. 64
Bayard vs. McLane, 3 Harr. (Del.) 139, 213-14..... 42
Benedict vs. Guardian Trust Co., 91 N. Y. App. Div. 103, 108; S. C. 86 N. Y. Supp. 370, 374..... 48
Beuttell vs. Magone, 157 U. S., 154, 157-8.....17, 54
Brady vs. Daly, 175 U. S. 148..... 52
Breakwater Co. vs. Donovan, 218 Fed. 340, C. C. A. 6th Cir. 1914..... 59
Brown vs. Ginn, 66 O. S. 316..... 41
Brown vs. Reinhardt, 210 N. Y. 162 (1914)..... 58
Charlotte National Bank vs. Southern Railway Co., 179 Fed. 769; C. C. A., 4th Cir. 1910.....59, 64
Chattanooga Fdry. & Pipe Works vs. City of Atlanta, 203 U. S. 390, 393-394..... 52
Chesapeake & Ohio R. R. Co. vs. McKell, 209 Fed. 514; C. C. A., 6th Cir., 1913.....59, 64
City of Atlanta vs. Chattanooga Fdry. & Pipe Co., 101 Fed. 900, 902, 906.....52, 53
City of Atlanta vs. Chattanooga Fdry. & Pipe Works, 127 Fed. 23-28, 29..... 52
11 Corp. Jur., 234, note 16..... 38
Cresinger vs. Lessee of Welch, 15 O. 156.....34, 35
Davy vs. Insurance Co., 78 O. S. 256..... 41
Dooley vs. Pease, 180 U. S., 126, 131-2 (1900)..... 17
Empire State Cattle Company vs. Atchison, Topeka and Santa Fe Railway Company, 210 U. S., 1, 8 .....17, 20, 21, 55, 57, 61, 65
Erwin vs. U. S., 97 U. S. 390-396..... 52
Healey vs. Robinson, 11 O. N. P. (N. S.) 329..... 41
Huntington vs. Attrill, 146 U. S. 657..... 52
Imperial Film Exchange Co. vs. General Film Co., 244 Fed. 985.....52, 53
International Battery Co. vs. Westreich, 182 App. Div. 843; 170 N. Y. Sup. 149, 1918..... 59
Judson vs. Corcoran, 58 U. S. (17 How.) 612-614.... 52
Judy vs. Louderman, 48 O. S. 562, 573, 574..... 47

Key vs. Vattier, 1 O. R. 58..... 41
Laing vs. Rigney, 160 U. S., 531 (1895)..... 16
Lancaster vs. Collins, 115 U. S., 222, 225 (1885)..... 16
Lehnen vs. Dickson, 148 U. S., 71, 72-3 (1892)..... 16
Lessee of Hall, et al., vs. Ashby, et al., 9 O. 96..... 33
Lessee of Borland, et al., vs. Marshall, 2 O. S. Rep. 308, 314 .....35, 36
Lewis vs. Bell, 58 U. S. (17 How.) 616-617..... 52
Minahan vs. Grand Trunk Western Ry. Co., 138 Fed. 37, C. C. A. 6th Cir. 1905..... 59
Moses vs. McDevitt, 88 N. Y., 63, 65..... 30
Parks vs. Ross, 52 U. S. (11 Howard) 362, 373 (1850) 16
Peugh vs. Porter, 112 U. S. 737..... 52
Pennsylvania Co. vs. Lombardo, 49 O. S. 1..... 41
Perkins vs. Board of Commissioners, 80 O. S., 495... 59
Reece vs. Kyle, 49 O. S. 475.....33, 40, 41, 53
Railway Co. vs. Wolcott, 58 O. S. 362..... 41
Runkle vs. Burnham, 153 U. S., 216, 225..... 16
Schmidt vs. Bank of Commerce, 234 U. S. 64, (1913) (Reversing 16 New Mex. 414).....57, 65
Sena vs. American Turquoise Co., 220 U. S., 497 (1910) 57
Siqua Iron Co. vs. Greene, 88 Fed. 207; C. C. A. 2nd Cir., 1898..... 59
Southern Pacific Company vs. United States, 222 Fed. 46; C. C. A., 9th Cir., 1915.....59, 63
Stewart vs. Welch, 41 O. S. 483..... 41
3 Story Equity Jurisprudence, (14th Ed.) Sec. 1411, pp. 69-70 and notes.....37, 40
3 Story Equity Jurisprudence, (14th Ed.) Sec. 1411, Note 3, p. 70..... 38
3 Story Equity Jurisprudence, (14th Ed.) Sec. 1414, p. 73-4, Note 6.....38, 42
Thornton, Sherman Act, Sec. 421..... 52

United Copper & Securities Co. vs. Amalgamated Copper Co., 232 Fed. 574, 577-8 52
Walker's American Law, pages 222-3 and 403 to 404, 8th Edition, 1882 36
Ward vs. Joslin, 186 U. S., 142, 147 (1901) 17
Weakly vs. Hall, 13 O. R. 167 41
Wetmore vs. Hegeman, 88 N. Y., 69, 73 31
Wightman vs. Catlin, 113 App. Div. (N. Y.) 24, 27 ... 31
Williams vs. Vreeland, 250 U. S., 295 (1919) 17, 58
"*The Francis Wright*," 105 U. S. (15 Otto), 381 (1881) 16

No. 340.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

JOSEPH H. SAMPLINER,
Plaintiff in Error,
(Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY,
VITAGRAPH COMPANY OF AMERICA,
BIOGRAPH COMPANY,
THOS. A. EDISON, INC.,
KALEM COMPANY,
PATHE FRERES,
FRANK L. DYER,
HARRY N. MARVIN,
JEREMIAH J. KENNEDY,
WILLIAM PELZER,
JACQUES A. BERST,
ALBERT E. SMITH and
PERCIVAL L. WATERS,
Defendants in Error,
(Defendants Below).

BRIEF FOR PLAINTIFF IN ERROR.

THIS CASE COMES INTO THIS COURT BY ERROR TO THE ACTION OF CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING A JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND DENYING A PETITION FOR RE-HEARING.

STATEMENT OF CASE.

Plaintiff, as assignee of The Lake Shore Film & Supply Company, an Ohio corporation, sued defendants in the United States District Court for the Southern District of New York. The complaint contained appropriate

averments to show that the plaintiff's assignor had been damaged in its property and business by acts of defendants in violation of the Sherman Anti-Trust Law and the Clayton Law, to the extent of $250,000.00. Plaintiff claimed he, as assignee, was entitled to recover, by virtue of the Federal Statutes referred to, three-fold damages, reasonable attorney's fee and the costs and disbursements of suit. It was further alleged that the assignment from The Lake Shore Film & Supply Company to him was made on or about December 28, 1911, and after its right to recovery of all of said damages had accrued.

It further alleged a decree in a suit in equity under the Federal Anti-Monopoly Act, entitled: "*United States of America vs. Motion Picture Patents Company, et al.,*" by reason of the self same acts complained of in the complaint, including the defendants herein, in favor of the United States Government and against the defendants, and claiming the benefits of the Clayton Act, making the decree *prima facie* evidence. (Record pp. 3-33.)

By a second bill of particulars he alleged that the consideration of the assignment was a precedent indebtedness of his assignor to him for certain legal services in connection with these transactions set out *in extenso.* (Record p. 148.)

Answers were filed by two of the defendants which seem to be identical, except for the name of the defendant filing the answer.

The answer of Pathe Freres, in the first place, denies by number a considerable number of the numbered paragraphs of the complaint. This denial did not include No. 130, the only one relating to the assignment. (Record pp. 34 to 35.) It then, in paragraphs numbered

LXII, pp. 35 to 43 of the Record, set forth averments appropriate to a denial that the defendants had committed any breach of the Federal Acts referred to in the complaint. Then,

> "for a further separate and distinct defense, this defendant alleges on information and belief" (Record p. 43),

by numbered paragraph LXIII, the defense of the statute of limitations.

Then, "for a further separate and distinct defense," by paragraphs numbered LXIV to LXVI (Record pp. 43 to 44),

> "upon information and belief, that the plaintiff is and at the time of his alleged purchase of the claims in controversy, set up in the complaint herein, was an attorney and counsellor-at-law of the State of Ohio, practicing as such before the courts of that State."
>
> "LXV. Upon information and belief, that at the time of said alleged purchase, it was, and is now, the law of the State of Ohio, that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such demand by such purchase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the State of New York."
>
> "LXVI. Upon information and belief, that the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon."

The answer of Percival L. Waters (Record pp. 45 to 52) contains paragraphs numbered 1 to 53. By par-

agraph one, certain numbered paragraphs of the complaint were denied.

By paragraph two, he denies

> "that he has any knowledge or information thereof, sufficient to form a belief, as to the allegations contained in the paragraphs of the complaint herein numbered respectively."

Then follows an enumeration of numbers which includes paragraph number 130 of the complaint. Then follows allegations appropriate to the denial of the violation of the Federal Acts referred to, and then, by paragraphs 49 to 50, "For a further separate distinct and partial defense" are averments appropriate to raise defenses of statutes of limitations. (Record p. 51.) Then, as a further separate and distinct defense, paragraphs 51 to 53, identical with paragraphs LXIV to LXVI as to the circumstances of the purchase by plaintiff of the claim sued upon.

Bills of Particular were filed by the plaintiff, the first (Record pp. 192 to 199) making more definite the averments of the complaint and setting forth a copy of the assignment. By the second Bill of Particulars (Record pp. 188 to 192), setting forth the items of the services rendered by plaintiff, to his assignor, forming the consideration for the assignment, and stating

> "The assignment to the plaintiff was an absolute assignment, and he at that time became the sole owner of the subject matter of the said assignment."

The District Court made an order, that

> "the issues of fact and law arising under the defense contained in the answers of the defendant in paragraphs LXIV to LXVI, including the title of the plaintiff's to the cause of action herein sued upon, is separately tried." (Record p. 54.)

Under that order, these issues were tried; the only evidence being the testimony of three witnesses in behalf of plaintiff, being the Secretary and President of plaintiff's assignor, and the plaintiff himself. Defendants offered no testimony.

Of course, the court having ordered a separate trial of these issues, upon this hearing, it must be assumed that the averments of the plaintiff on the other issues were true. In other words, it must be assumed, as against defendants, that it was true that the defendants had injured plaintiff's assignors in the way, and to the amount, set forth in the complaint; that the wrongful acts of the defendants, in violation of the Sherman and Clayton Acts, had destroyed its business and put plaintiff's assignor out of business. The testimony of Mr. Sherman, Secretary (Record pp. 65 to 122), after many technical objections, and some that we must characterize as captious, established that there were five Directors of plaintiff's assignor, and that these five owned all the stock of plaintiff's assignor; that the action that was taken was taken by all five of these Directors and stockholders meeting together. This being so, and none of the directors or stockholders raising any question as to the regularity of the proceedings, we submit that the ruling of the District Court as to the necessity of preliminary notice of the meetings, and as to proof of regularity of meetings of plaintiff's assignor, were incorrect. These were excepted to. It is settled law, and it is unnecessary to cite authorities, that when all the stockholders and all the directors attend a meeting, without objection, and unanimously take certain action at that meeting by which they still abide, that the presence or absence of proof of regularity and formality of the meeting, or notice of the meeting, becomes entirely immaterial.

Mr. Sherman testifies that he kept pencil notes on tablet paper of the proceedings of these meetings which occurred in December, 1911; that these had not yet been transcribed when all the property of plaintiff's assignor was transferred to one of defendants in March, 1912; that these leaves were contained in the minute book of plaintiff's assignor, which was turned over to the plaintiff's assignor when the transfer occurred, but had not been entered up in the minute book by the representative of defendant, The Motion Picture Patents Company. This was not denied by anybody, and the leaves were not produced by defendant, although the minute book was, and therefore, on the familiar rule of law, it must be presumed that these leaves, if produced, would have contained that which Mr. Sherman testifies they did contain.

The testimony alike of Mr. Sherman and of Mr. Mandelbaum (Record pp. 122 to 142) developed these facts: Mr. Sampliner had acted as the attorney for the plaintiff's assignor for some time in relation to the matters set forth in plaintiff's second Bill of Particulars. The evidence did not minutely, but only generally describe these services because the court held further particulars unnecessary; that the Directors, at a regular meeting, appointed Mr. Mandelbaum and Mr. Schachtel, another director, to call upon Mr. Sampliner, their attorney, and learn from him whether plaintiff's assignor had, in his opinion, a good cause of action against defendants for the injury that they had done to plaintiff's assignor's property and business; that, in pursuance of this direction, they did call on Mr. Sampliner; that he told them that, in his opinion, they did have a good cause of action; that they then asked him what the pro-

ecution of that suit would cost; that he told them that it would cost somewhat about $10,000.00; that then Mr. Mandelbaum, who was President of the company, told Sampliner

> "that the company could not afford to stand a law suit under that expense at that time; that they did not have the funds" (Record p. 127) and "asked Sampliner as to the amount that the company owed him at that time for services already rendered,"

to which Sampliner answered that it would be about $8,000.00, but that he would take $5,000.00 in cash, to settle immediately. Mr. Mandelbaum replied

> "I do not believe that the company could pay him, because we did not have the money and could not pay him at that time; that we could not stand a suit, and I suggested to him whether some compromise—some settlement—could not be made, whereby we were to assign any rights to him that we may have against the Patents Company in consideration for what we owed him and he told me he thought he may consider that. He afterwards communicated with me or called on me in person and told me that he considered that he would accept that. And I called a special meeting for the purpose of putting it before the board and as—and it was settled accordingly." (Record p. 127.)

That, thereupon a special meeting was called of the directors, who included all the stockholders, at which the matter was canvassed, and it was decided that they were not able to stand the cost of suing defendants, and that they did not have the money to pay Sampliner, and that it was advisable to make the assignment to Sampliner, and an assignment was accordingly ordered and executed, which is the assignment now in question.

About all this, there is no dispute. Mandelbaum distinctly states (Record pp. 127 to 132) that he and not

Sampliner suggested the assignment; and also (Record p. 133) that there was nothing said to Sampliner about his bearing the expense of any fight to sustain the claim against the Patents Company. He states (Record p. 139) that the future services to be performed by Sampliner in consideration of the transfer were

> "the services required to defend the stock we had then on hand, that we had bought through the Motion Picture Patents Company * * * the merchandise, the film—or if any replevin suit was brought against us to recover these films, but he would defend us without any cost. * * * The matter was also discussed, that in case they would force us to pay further royalties, that he would defend us in that matter as well."

Infringement suits had at that time been threatened by the Patents Company against other rental exchanges (plaintiff's assignor being a rental exchange) that had done business with plaintiff's company. (Record pp. 139 to 140.) Sampliner was to do nothing more in case of such litigation, except to act as the attorney for plaintiff's assignor.

During the course of the examination of Mr. Mandelbaum, he was asked as to the services that had been performed by Sampliner, as attorney. On objection of defendants' attorney, Mr. Seabury, the court said:

> "I do not think it makes any difference. I presume there will be no controversy that the services rendered were worth if you like $5,000.00."
>
> "Mr. Seabury:
>
> There is no way we can dispute that."
>
> * * * * * * * *
>
> The Court:
>
> "You have shown the services. It is only a question of value and Mr. Sampliner can put his value on them." (Record p. 125.)

Then, after some other testimony of Mandelbaum's, the court said:

"That is all you need on that point. I will ask the counsel for the defendant. You have no testimony to show that he did not render services?

Mr. Seabury: We have no testimony to show that he did not render services and not knowing we cannot say anything as to their value.

The Court: You have no testimony in contradiction of this?

Mr. Seabury: No testimony as to services rendered or as to the value of services, we know nothing about them."

Mr. Sampliner was the last witness. His counsel started to examine him as to the services he had performed, and as to the value thereof. The court said:

"Mr. Rogers, let me suggest to you that there is only a question of law in this case and therefore that the record will show the services rendered. There is only a question of law. If at any time in the course of the trial I regard the services and their character of any importance I will give you an opportunity to recall Mr. Sampliner to describe them in detail. At the present time I am disposed to think that the jury will not be concerned with examining into the detail of the services rendered. Therefore, I suggest that you offer the bill of particulars and Mr. Sampliner may state that it is a true and correct bill." (Record pp. 144, 145.)

Bill of Particulars No. 2 was then offered in evidence. Mr. Sampliner testified that he performed the services; that he knew the compensation received by Ohio attorneys during that time, and the question was then asked:

"What in your opinion would have been the fair and reasonable value of the services you rendered to the Lake Shore Company between the dates

mentioned in the bill of particulars, Plaintiff's Exhibit 5?

A. From $8,000 to $10,000."

He then states the conversation that he had with the committee of plaintiff's assignor, the two directors, Mr. Mandelbaum, President, and Mr. Schachtel, another director; states that they asked him whether a suit would lie against the defendants for the purpose of recovering damages sustained by plaintiff's assignor, by reason of the heavy loss in their business, to which he answered that he would bring the suit, if they wished him to; that he had looked into the matter before and was satisfied that they had a valid claim against this combination.

"Mandelbaum then said:

"Well, what will a suit of that kind cost us?

"I told him that in view of the fact that many of the exhibitors and rental exchanges were situated in different parts of the United States and perhaps as many as a hundred different exhibitors had been injured in their business, their licenses abruptly cancelled and put out of business, and that it would require the taking of the deposition of these people at the places where they resided or where their business was located, and that the cost of a suit of that kind in connection with the fees that would be created or the compensation for my work so far as I could then judge would be in the neighborhood of $8,000 or $10,000. And Mr. Mandelbaum said 'we haven't got the money, our business has been very poor and we have been losing money. We have been meeting here recently to attempt to finance the company. We owe for borrowed money and it is absolutely impossible for us to undertake any litigation of that kind.' He also stated at the same time that by reason of the unfair competition that the General Film Company had given them after they had bought out the United Film Company of Cleve-

land who at that time were competitors of the Lake Shore Film Company, the damages that the General Film Company has done to the Lake Shore Film Company that they had been losing money and that they had lost very heavily and that is the reason that they were unable to get along without borrowing money. He at the same time asked me, 'Well, what do we owe you for the work that you have done?' and I told him that my bill was in the neighborhood of $9,000 or $10,000. Well, he says, 'we cannot pay it, we haven't got the money.' It was then that I said to him 'if you will pay me $5,000 in cash I will cancel my indebtedness that I have against you.' "

He further said that Mandelbaum and Schachtel both told him "they cannot pay it, they haven't got the money, they are hard up." Then Mandelbaum made the proposition that plaintiff's assignor would transfer to him all the rights it had against the defendants, if he would take that assignment, accept it as a transfer for the indebtedness it owed him. He replied that he would have to consider it. He considered it for two or three days, and maybe four, and then went over to the office of the President, Mandelbaum, and, meeting Mr. Mandelbaum, told him that he would cancel the obligation for a transfer of the claim. Mandelbaum then answered that the Board had considered it, and advised him and Sherman to see plaintiff about it, and wanted to know whether, if they were to assign would plaintiff defend the Lake Shore Supply Company or either of the individuals or officers of the company at the time in case any suit was brought against them in matters growing out of these so-called motion picture combination suits or unfair competition, either by way of replevin action or perhaps where there was an injunction granted preventing some of the exhibitors with whom the Lake Shore Film Com-

pany were then dealing in renting and leasing films of the then independent manufacturers—if a suit was brought enjoining the exhibitors from the use of the films which the Lake Shore Film Company had on hand after the cancellation of the license period and also in case any replevin action was brought whether or not plaintiff would defend as against those as a part of the consideration. When asked "Were these so-called replevin actions or injunction proceedings any part of the so-called claim for damages," plaintiff said no, he was to do nothing beyond defending such future actions. There hadn't been any replevin action. (Record pp. 146 to 148.)

The amount of the claim of plaintiff's assignor against defendants was not mentioned, and it was only sometime after the assignment was made that, at the request of plaintiff, Mr. Sherman, the Secretary, went through the books of plaintiff's assignor and discovered the amount.

Plaintiff knew that plaintiff's assignor had been damaged severely by defendants, but did not know the exact figure. (Record p. 150.) He also knew of some items of damage which were not shown on the balance sheet prepared for his use by Mr. Sherman (Record p. 151). The assignment was before the decree in the suit in equity brought by the United States against defendants, under the Sherman law, in which it was decreed that the defendants' acts averred of in the complaint constituted a violation of the Federal Statutes. But he testifies the present action was brought after that decree (Record p. 152).

He further testifies that, although he had no accurate knowledge at the time of the assignment, from the knowledge he then had, he thought he had considered

that his assignor had damages to the extent of at least $75,000 at that time. He was then asked:

"Q. So that you thought that this law suit would bring forth at least $75,000?

A. No, I did not consider a law suit at the time.

Q. You thought that this claim as a claim was for $75,000 at least?"

He is then questioned by the court as to whether he thought that if suit was brought $75,000.00 could be recovered, and he then very sensibly, as a lawyer, said that he had no idea. The damages depended upon the verdict of a jury, and what the jury would award nobody could foresee.

He was then asked if he knew that if he brought a suit it would be expensive. He says he did (Record pp. 53 to 54).

He was then asked:

"Q. And did you know you would have to spend those disbursements out of your own pocket?

A. I did. I knew I was the only one who owned the claim and that I would have to do whatever was done.

Q. And you perfectly understood that the Lake Shore Company was not able to pay those expenses?

A. I knew that the Lake Shore Film and Supply Company had nothing further to do with the claim.

Q. And when you took this assignment you were fully informed of the necessity of you paying money out of your own pocket if any law suit was to be brought on this assigned cause of action?

A. I want to say that I knew that I, being the owner of the claim, that there was nobody else that would pay it. I had to pay it. It was my claim, then." (Record p. 155.)

He further said, in answer to a question as to whether he knew that the claim could not be enforced, unless he paid out of his own pocket the disbursements necessary in taking the testimony,

> "I wish to say that when that claim was assigned to me there was no doubt in my mind that I would be able without a law suit to settle that claim with these parties." (Record pp. 155-6.)

The defendant's counsel moved to strike out this answer. The court struck out, and the plaintiff excepted.

It seems to us that here was the most absolute error. He was being cross-examined with the intent to show that he took the assignment with the intention of bringing a suit, and he answers that he did not expect to bring a suit, because he expected to be able to settle it without suit, that the object of taking the assignment was to get the money and not to bring suit. That being the issue to which testimony is adduced, the court strikes it out.

We have now given in quotation or abstract all the testimony contained in the record in relation to the transaction between plaintiff's assignor and plaintiff, and as to plaintiff's intentions in taking the assignment. There is no contradiction, and from this it follows necessarily that plaintiff's assignor had a large claim against these defendants for destruction of their property, and injury to their business by the violations of the Sherman and Clayton Acts set forth in the complaint; that by these wrongful acts of defendants, plaintiff's assignor has been so financially injured that it was unable to bring a suit against defendants to recover these damages; that it so informed plaintiff, and, at the same time, asked him for the amount of his bill as attorney against them, for the matters set forth in the Bill of Particulars; that

he told them $8,000 or $10,000; that he was then told by his assignor that, in consequence of these wrongful acts of defendants, it could not pay him; that he thereupon offered to take $5,000.00 if his assignor would pay it in cash; that his assignor said that, on account of defendants' wrongful acts it couldn't do that, and then asked plaintiff whether he would accept the assignment in question in payment of his bill, and for any future services as attorney that might become necessary by reason of future wrongful acts of defendant; that after considering this some days he said he would; that thereupon the assignment was executed and delivered; that plaintiff had no other way of collecting his bill from his client; that he hoped to be able to effect a settlement with defendants without suit, but that he intended, if he could not effect any settlement, to bring suit against them; that at that time it would have been necessary to have taken depositions all over the country to enforce such a suit, but that subsequently, by virtue of the Clayton Act, the United States having obtained a decree against defendants, that on account of the wrongful acts set up in the complaint defendants constituted an unlawful trust, this made a *prima facie* case, which rendered it unnecessary to go to this expense, and left only the question of proof of the amount of damages.

This is all the testimony which is pertinent to the question of plaintiff having performed services for his assignor, and their value, and that they formed the consideration of the assignment, and of the execution and delivery of the assignment; and it is also all the evidence as to the motive and the reason for plaintiff taking the assignment in question.

We understand it to be the well established rule of this Court that when there is no evidence to sustain the

findings or the verdict of a court, or the verdict of a jury, in respects necessary to such finding or verdict, the injured party is not concluded in a reviewing court by such findings, or such verdict.

"The Francis Wright," 105 U. S. (15 Otto), 381 (1881).

The Court said, page 387:

"It is undoubtedly true that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court."

Laing vs. Rigney, 160 U. S., 531 (1895), the Court said, page 540:

"The plaintiff duly excepted to the findings and conclusions, and it is well settled that exceptions to alleged findings of facts because unsupported by evidence present questions of law reviewable in courts of error."

Parks vs. Ross, 52 U. S. (11 Howard) 362, 373 (1850).

Lancaster vs. Collins, 115 U. S., 222, 225 (1885).

Lehnen vs. Dickson, 148 U. S., 71, 72-3 (1892).

Runkle vs. Burnham, 153 U. S., 216, 225.

Beuttell vs. Magone, 157 U. S., 154, 157-8.
Dooley vs. Pease, 180 U. S., 126, 131-2 (1900).
Ward vs. Joslin, 186 U. S., 142, 147 (1901).
Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry., 210 U. S., 1, 8 (1907).
Williams vs. Vreeland, 250 U. S., 295 (1919).

This case and the preceding one are of particular interest because in both cases there were requests for peremptory instruction by both parties so that the situation is identical with the one now before the Court. The Court said, page 298:

> "The established rule is 'where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' And upon review a finding of fact by the trial court under such circumstances must stand, *if the record discloses substantial evidence to support it.*" (Italics ours.)

At the conclusion of the plaintiff's evidence both parties rested and both parties moved for a directed verdict. Thereupon the following colloquy took place between the court and counsel (Rec. pp. 169-172):

> "Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.
>
> The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.
>
> Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law

for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any 'ifs.' If you think under Section 973 of the Code, the Court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case.

Mr. Rogers: Then, your Honor, may I state my position on the record?

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's right, I beg leave to state my position on the record with the permission of the Court.

My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was *bona fide* for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule.

Mr. Rogers: Then I move for a direction, your Honor, for the plaintiff, upon the issue framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to-wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a *bona fide* assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors.

Having thus disposed of the facts, I proceed to express, briefly, I trust, my views of the law of the case.

* * * * * * * *

I grant the motion and direct a verdict for the defendants.

Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be.

(Whereupon, as directed by the Court, the jury found a verdict in favor of the defendants.)"

The plaintiff in error thereupon prosecuted error to the Circuit Court of Appeals for the Second Circuit,

and that Court affirmed the judgment of the District Court, on the ground that the Court was

> "not at liberty to review the Trial Court's findings of fact, but is as much concluded as it would be by a verdict of the jury." (Rec. p. 271.)

The Court said the above immediately after saying (Rec. p. 271):

> "There was the plaintiff's testimony which if the court accepted it would have justified a finding that the cause of action was assigned for an antecedent indebtedness. There was other testimony from which a court might infer otherwise. * * * The above facts are disclosed by the testimony of the plaintiff's own witnesses. The weight to be given to the testimony and the inferences to be drawn from it were for the court to determine in view of the request made by each side to direct a verdict in their favor."

It is quite evident that either as hereafter argued there was no evidence to sustain the finding of the Trial Court above quoted, or else there was evidence from which divergent inferences might be drawn.

The plaintiff thereupon filed a petition for re-hearing (Rec. pp. 275-280) on the ground that the Trial Court had no legal authority to make any findings of fact under the rule established by this Court in *Empire State Cattle Company vs. Atchison, Topeka and Santa Fe Railway Company*, 210 U. S., 1.

The Circuit Court of Appeals denied the petition for re-hearing, saying as a basis for their decision (Rec. p. 294):

> "The case recognizes the right of a party who has asked the court to direct a verdict to subsequently ask the court to have questions of fact submitted to the jury 'where the evidence on the issues joined is conflicting or divergent inferences may be drawn

therefrom.' But to make it error to refuse to allow the matter to go to the jury after asking for the direction of a verdict it is evident that there must be questions of fact which can be submitted."

Thus, the Circuit Court of Appeals affirmed the judgment of the District Court, on the ground that it was concluded by the findings of fact made by the Trial Court, and then it denied the petition for re-hearing filed by the plaintiff in error, on the ground that the rule of *Empire State Cattle Co. vs. Ry., supra*, was not applicable, since there were no questions of fact submitted to the District Court, failing altogether to recall the statements in their original opinion above quoted.

THE LAW OF THE CASE.

The contentions of the plaintiff in error in this case may be grouped under two fundamental exceptions:

(1) The defendants (defendants in error) failed to produce any substantial evidence in support of the defense of the illegality of the assignment and the Trial Court should have directed a verdict for the plaintiff upon this issue.

(2) If there were any questions of fact to be decided or divergent inferences of fact to be made the District Court erred in not submitting them to the jury.

These have been the two underlying contentions of the plaintiff in error throughout the trial in the District Court, the argument in the Circuit Court of Appeals and upon the petition for re-hearing.

The Honorable Circuit Court of Appeals in denying the application for re-hearing made by plaintiff in error

suggests that these two contentions are necessarily inconsistent. If these two contentions are inconsistent it means that every party who moves for a directed verdict must guess at his peril at the conclusion which will ultimately be reached by the Court of last resort. The Court of last resort will always decide whether there was any substantial evidence in support of a finding and a party certainly should be entitled to make the contention in the Trial Court that no evidence has been produced by the party sustaining the burden of proof and still insist upon his right to have the case submitted to the jury in case the Trial Court thinks that some evidence has been presented.

That is precisely the situation now before the Court. After both parties had rested, counsel for plaintiff in error moved for a directed verdict on the ground that the defendants had presented no evidence in support of the defense of champerty and he requested, at the same time, that the case be allowed to go to the jury if the Court was of a different opinion.

These two underlying questions will be taken up in their order.

I. THERE WAS NO SUSTANTIAL EVIDENCE IN SUPPORT OF THE DEFENSE OF THE ILLEGALITY OF THE ASSIGNMENT AND THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT FOR THE PLAINTIFF UPON THIS ISSUE.

The Court said:

"Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors.

Having thus disposed of the facts, I proceed to express, briefly, I trust, my views of the law of the case." (Record p. 170.)

It will be observed that the court found specifically that the assignment was made, that it was duly made. He does not find that it was not for value, or that the validity of the assignment is in any way affected by any want of consideration. The sole ground upon which he bases his conclusion adverse to plaintiff-in-error is that "the plaintiff purchased this cause of action with intent to sue thereon."

When, however, he comes to express his opinion upon the law of the case (Record p. 171), we find that he does it, in the first instance, on the grounds which would prevent an attorney from ever taking an assignment of an unliquidated claim, that is a claim, the amount of which depended upon opinion, and as to which a court or jury might give a verdict, varying in amount according to their opinion.

He also indicates very clearly, as he did during the course of the trial, hostility to provisions of the Sherman Act, by which the injured party is entitled to recover three-fold damages. He characterizes a purchase by a defendant of such an unliquidated claim as being "speculative." Then, attempting to reproduce Mr. Sampliner's testimony, he reproduces it thus:

"The plaintiff said 'at the time I bought the claim'—that is unquestionably what he did—'if he could get a settlement well and good; if he could not

get a settlement, then he would *speculate* upon what damages he could obtain.' " (Our Italics.)

The witness did not testify any such thing. We have already quoted his language, in which he says that, at the time he bought the claim he did not consider a lawsuit at the time (Record p. 153). Then, after saying that, as it was an action in tort, in which the amount of recovery could not be determined, "I wish to say that when that claim was assigned to me there was no doubt in my mind that I would be able without a lawsuit to settle that claim with these parties" and that is every word of testimony there is from Mr. Sampliner or anyone else in relation to knowledge or intention on his part.

How the court can evolve from this testimony that he bought with an intention to speculate upon the damages that he could obtain, we are unable to determine, especially in view of the decision of the Court of Appeals of New York, to which we shall presently refer. The trial court then very kindly suggests that if plaintiff's assignor had brought the suit, plaintiff might have taken it on a contingent fee. This is a very valuable suggestion, in view of the undisputed evidence that defendants' violations of the Sherman and Clayton Acts had so injured plaintiff's assignor in its finances and property that they could not bring such an action.

The court then proceeds, after saying that he might take it on a contingent fee,—

> "he was ready to take this claim and pay money out of his own pocket, which is champertous in itself, for the disbursements necessary to prosecute this law suit to an end." (Record p. 171.)

With all deference to the learned trial court, we assert, and shall presently attempt to show, that the buying of a claim with knowledge that it is disputed and

that plaintiff would have to pay the expense of enforcing his own claim, has never, by any court, or by any text book written, been held to be champertous, and, since the time when the assignability of claims has been established, has never been held to be unlawful maintenance.

He then quotes the language of Chancellor Kent in *Arden vs. Patterson,* a suit brought by client to set aside a transfer made by him to his attorney on the ground of fraud practiced by the attorney upon the client in obtaining the transfer, in that he concealed from the client the chance of recovery, and the amount of recovery. The language which was pertinent to such a case has nothing whatever to do with any questions in the case at bar. Upon this reasoning he grants the motion. The learned Circuit Court of Appeals states (Record p. 266):

> "The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants and that those services extended over a period from July, 1910, to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the President of the Lake Shore Company whether he would be willing to bring suit against the defendants, and that he replied that he would bring the suit being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him and replied in the neighborhood of $9,000.00 or $10,000.00. He was told the company did not have the money and could not pay him, and thereupon he said that if the company would

pay him $5,000.00 in cash he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment and was told that the board of directors wanted to know whether if they made an assignment the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties with the defendants. He agreed to do this and the assignment was executed.

It appears therefore that the assignment originated not with the plaintiff but with the Lake Shore Company, and that the consideration for the agreement—involved the payment of a past indebtedness as well as for future services of a professional character. It is also to be noted that the invalidity of the assignment is set up not by the client, the assignor, who has at no time sought to repudiate it, but by third parties between whom and the plaintiff no fiduciary relations have existed." (Record pp. 266, 267.)

The court then, like the trial court, found that the assignment was executed; that it was for value; that no imposition was practiced by the plaintiff upon his client, the assignor; that therefore, as between plaintiff's assignor and plaintiff, the assignment had a valid consideration; was legal and equitable; and that the client was still satisfied therewith. So that we have the undisputed testimony, the finding of the trial court, either express or implied, as to the assignment being made and delivered, it being for value, and without any fraud practiced by the attorney for his client, and its being valid as be-

tween the plaintiff and his assignor. This obviously leaves to support the finding and decree of the trial court, nothing but the one question as to whether the trial court was correct in finding that the assignment was made with mere intent to bring a suit thereon, and "that plaintiff purchased this cause of action with intent to sue thereon."

The reviewing court says (Record p. 271):

> "There was the plaintiff's testimony which if the court accepted it would have justified a finding that the cause of action was assigned for an antecedent indebtedness. There was other testimony from which a court might infer otherwise."

Now, as the trial court did not find, nor base its ruling on any finding that the cause of action was not assigned, nor that there was want of an antecedent indebtedness which formed a valuable consideration, but only upon the proposition that the claim was assigned with an intent to bring a suit thereon, it becomes interesting to know what evidence the reviewing court found to sustain that singular proposition.

They state the following:

1. "No bill had ever been rendered by the plaintiff to the Lake Shore Company for the legal services that plaintiff says he rendered between July, 1908, and December, 1911." (Record p. 271.)
2. "No demand of payment had been at any time made." (Record p. 271.)

The short answer to this is, these matters only go to the question of whether the plaintiff had rendered services to his client between July, 1908, and December, 1911. From the quotations already made from the testimony, and from what the court said on the trial, and from the absence of any negative finding in its findings, it is apparent that no such question was open to the trial

court for consideration, or was considered by the trial court. Further, if the fact that a lawyer does not render a bill to his client for uncompleted work is evidence that he has not performed any services, or that they were not of any value, a very large part of lawyers' bills in the City of Cleveland might be disputed on this ground. They habitually do not send any bills until the completion of the particular work, because, rightly or wrongly, they believe that the value of the services to the client has something to do with the amount that should be charged, and therefore wait for the conclusion of the separate work before rendering a bill, or demanding payment.

3. "No entry had been made in the Lake Shore Company's minute book, either of the making of this assignment, or of the meeting of the Directors at which this assignment was discussed or authorized." (Record p. 271.)

4. "No disclosure of this assignment was made to the Mutual Film Company, to which, in March, 1912, the Lake Shore Company sold all its assets, notwithstanding the fact that the president of the latter company entered the employ of the Mutual Film Company as general manager at that time and remained with it in that capacity until March, 1913." (Record p. 271.)

These things go only to the question whether the assignment was made and authorized by the Lake Shore Company.

But the trial court found specifically—

"I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors."

Indeed it would be somewhat extraordinary law, if the fact that the assignor company made no entry in its minute book of the fact of its assignment, and of its silence in relation to the assignment, when it sold its property, would be receivable in evidence against the assignee, when both things were unknown to the assignee. This would, indeed afford an insolvent company a very easy way of making money (1st) by getting value for its assignment, and (2nd) by invalidating its assignment by failure to make any entry in its minute book, or make disclosure of the assignment when it sold its property, and thus obtained a second price for the property assigned.

These are the only things which the learned court of review found, the only things from which it thought any inference could be drawn to sustain the action of the trial court. As we have pointed out they are things relating to matters which the trial court expressly or impliedly found adversely to defendants. The reviewing court does not point out any evidence to sustain the finding of the trial court that plaintiff bought the claim not in payment for an antecedent debt, but to sue upon.

It is ascertained by the finding of the trial court, and the undisputed evidence which there is nothing to contradict, that there was a precedent debt to him of the plaintiff's assignor, that the assignment was given for the purpose of extinguishing the debt, and did extinguish it, leaving only the question whether the undisputed fact that the plaintiff intended, in the first instance, to get his money by a compromise and settlement, and to bring suit only in case he could not thus get anything on his debt, changed the character of the transaction from that of one to pay an antecedent debt, from

that of one not to pay an antecedent debt, but solely and merely for the purpose of bringing suit thereon.

In New York there is a statutory provision that the purchase of a chose in action by an attorney "with the intent and for the purpose of bringing an action thereon" is void. Commenting upon this provision, Rapallo, J., said in *Moses vs. McDevitt*, 88 N. Y., 63, 65:

> "This language is significant and indicates that a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, *and this implies the exclusion of every other purpose.* As the law now stands, an attorney is not prohibited from discounting or purchasing bonds and mortgages and notes, or other choses in action, either for investment *or for profit; or* for the protection of other interests and such purchase is not made illegal by the existence of the intent on his part at the time of the purchase, to bring suit upon them if necessary for their collection. **To constitute the offense the primary purpose of the purchase must be to enable him to bring suit, and the intent to bring suit must not be merely incidental and contingent.** The object of the statute, as stated by Chancellor Walworth, in *Baldwin vs. Latson* (2 Barb, Ch., 306), was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee." (Black face type ours).

And so it was held by a unanimous court that it was error to instruct the jury that, if the plaintiff who had purchased a bond and mortgage to compel the transfer of certain stock, intended to sue if the defendant refused to comply with his wishes, the purchase could be in violation of the statute.

See also *Wightman vs. Catlin*, 113 App. Div. (N. Y.) 24, 27.

In applying the doctrine of *Moses vs. McDevitt, (supra)* that the claim must be purchased for the very purpose of suing thereon, in order that the purpose should constitute a violation of the statute, it was held in *Wetmore vs. Hegeman*, 88 N. Y., 69, 73, that where the attorneys in charge of an action, acting through a dummy, purchased the claim pending the suit, it was in violation of the statute.

If then, when a statute specifically prohibits buying a claim by the attorney with intent to sue, it is not a violation of the statute to buy a claim with the mere intent to sue, in case it is necessary in order to enforce collection, *a fortiori*, it cannot be true that the purchase of a claim by an attorney with the same conditional intent to sue to enforce collection can be in violation of the rule of the common law, if such rule there be, prohibiting the purchase of a claim by an attorney with intent to sue thereon.

But, in Ohio, where this assignment was made and received, there is no such statute. The only provision is General Code, Sec. 12847:

> "Whoever, being a judge, * * * * attorney, counsellor at law, encourages, excites or stirs up a suit, quarrel or controversy between two or more persons with intent to injure any of such persons, shall be fined not more than $500.00."

It is obvious that this punishes simply what was known at common law as barratry, does not relate either to maintenance or champerty, and has no bearing on any facts existing in the case at bar. The purchase did not excite or stir up any suit, quarrel or controversy between the Lake Shore Company and the defendants because:

(a) The quarrel or controversy already existed and the suit would have been brought had the Lake Shore Company had sufficient financial ability.

(b) The quarrel or controversy, or possibility of suit between defendants and any one but plaintiff was ended by the assignment.

(c) No one pretends the purchase was made with intent to injure either the Lake Shore Company or defendants, unless an intent either by compromise or suit to make a wrongdoer atone for at least a part of the damage he has inflicted is an intent to injure him.

Very obviously, if it is true that a person or attorney cannot purchase a chose in action with intention to sue upon it, if it is not paid or compromised, without thereby invalidating the purchase, the purchase of choses in action would be unlawful, for nobody ever buys a chose in action without intent to adopt any means necessary to get the whole or a satisfactory part thereof.

We pass now to a consideration of whether the assignment in question is forbidden by any rule of law existing in Ohio, to the law of which the answers refer as a test of the validity or invalidity of the assignment in question.

The Assignment was not Void, Either as a Purchase of a Contentious or Litigious Claim, nor as Maintenance nor as Champerty, or in Violation of Any Other Rule of Law.

A.

It was not Void as a Purchase of a Contentious or Litigious Claim.

By the common law it was for a long time forbidden to assign any chose in action. This was a rule very

early discarded in equity, and more slowly by the courts of law. This rule, its history, its limitations, and that it has long ceased to be law in Ohio, is set out at length and decided by the Ohio Supreme Court in *Reese vs. Kyle*, 49 O. S. 475.

Possibly as a branch of this doctrine, possibly as an independent rule of law, at common law it was held that a claim which was controverted or, as it was called, a contentious or litigious claim could not be sold or bought, and that land held in possession by another than the Grantor under a claim adverse to the Grantor, could not be legally conveyed.

The Supreme Court of Ohio has clearly declared that this is not, and never has been, the law of Ohio.

In *Lessee of Hall, et al., vs. Ashby, et al.*, 9 O. 96, a deed was made of land in the possession of a person holding it on a claim adverse to the grantor. It was insisted that this conveyance was void for that reason. Said the Ohio Supreme Court:

> "But it is argued, in the second place, that a conveyance to the plaintiffs, while the defendant was in the adverse possession of the land, was a void act, and that no title could be derived under the deed. But we have no statute against champerty in Ohio. All the English statutes have grown out of peculiar exigences, which are almost entirely foreign to our condition and habits. Sometimes they were passed at the close of a signal revolution, when the property of the kingdom having, to a great extent, changed hands, it became the interest of those who succeeded to power, to place every possible obstacle in the way of the former proprietor's recovering possession. After the introduction of uses, buying what were called pretended rights and titles became

very common, and this gave rise to one of the last statutes on the subject, that of the 32d H. 8, which prohibited the practice under the penalty of forfeiting the whole value of the land. Both of these classes of laws were adapted to a state of society very different from what prevails here. So far from opposing obstacles to the transmission of land, we have endeavored to render it as free as possible. The simple prohibition of selling land, where the vendor has not a title to it, 29 O. L. 142, has set bounds to the only real inconvenience and mischief which has sprung from the practice of champerty."

The next case in Ohio is *Cresinger vs. Lessee of Welch*, 15 O. 156. This is a case very elaborately argued by distinguished counsel and elaborately considered. It involves the question whether a purchase of land, and receiving a deed from persons out of possession of lands, was an act of champerty, or maintenance, or void, as a purchase of a controvertel title.

The court was requested to charge that it was and refused. This was assigned as error. Said Judge Hitchcock, delivering the opinion of the court,

"The question here presented is not one which now comes before the court for the first time. It is well known that, in England, a sale and conveyance of land, by a person out of possession of land, the same lands at the time being in possession of another claiming title, would be void, as being against the policy of the law. Whether this is a principle of the common law, or whether it is based upon some statute, is a question which has been much controverted. But this is a matter of little consequence, so long as such is the law. In many, probably in most of the states of this Union, the same principle prevails; but in this state the decisions have, from the earliest period of our judicial history, been different, and such sales and conveyances have been

held to be valid. This identical question was before this Court in the case of *Hall, et al., vs. Ashley, et al.*, 9 Ohio, 96; and the title acquired under such circumstances was held to be good. The case referred to is the first brought before the court in bank, in which this question was agitated, and the decision was merely in affirmance of what was understood to be the rule of law, as established by frequent determinations on the circuit. Now, I have no hesitation in saying that, in my opinion, the rule contended for by plaintiff's counsel would be beneficial, and highly conducive to the public interest. It would prevent the practice of purchasing doubtful titles. It might interfere with the interest of keen-sighted speculators, who make it a business to hunt up and purchase in such titles, but it could do no injury to the honest man. But although such is my opinion, still, acting in a judicial capacity, I can not consent to change the rule. Such change would interfere with a multitude of land titles heretofore acquired, and acquired, too, with a knowledge of the law as expounded by the court. But there is a body which can apply a remedy which shall operate hereafter; that body is the general assembly. And to me it is a matter of surprise that we have not an act upon our statute books, declaring void sales made under the circumstances referred to by counsel in their second request to the court. But until some statute of the kind is enacted, we feel ourselves bound by the law as heretofore settled."

Cresinger vs. Lessee of Welch, 15 O. 156, 190, 191-2.

No such statute as was suggested by Judge Mitchcock, was ever passed.

The question came incidentally before the Ohio Supreme Court again in *Lessee of Borland, et al., vs. Marshall*, the opinion being delivered by Judge Thurman, one of the most distinguished judges who ever sat

upon the Ohio Supreme bench. After saying that delivery of seizin has never been essential in Ohio to the creation of a freehold estate, nor an entry necessary to perfect the title of an heir or devisee, he proceeded "the most common instrument of conveyance is a deed of bargain and sale." Then, he proceeds,

> "But our departure from the English law does not stop here; for an adverse possession does not prevent the transfer of title, either by deed, descent or devise. Whatever title is held by the grantor, ancestor, or testator, may be thus transferred, notwithstanding the lands are adversely held by another."
>
> *Lessee of Borland, et al., vs. Marshall*, 2 O. S. Rep. 308, 314.

These three cases have been regarded as so effectually settling the law of Ohio that the heading of transfers of litigious or controverted claims by persons out of possession of land held adversely, as disappeared from Ohio Digest, and we have left only the heading "Champerty or Maintenance." See Bates Digest, Page's Digest, and all other more recent Ohio Digests.

The same rule is laid down in Walker's "American Law," a text book, written by a professor in a Cincinnati Law School, which, until recently, was used in all Ohio Law Schools, usually in preference to Blackstone. On pages 222-3 and 403 to 404 (we refer to the 8th Edition, 1882) he discusses the question. On pages 222 to 223 he defines "Maintenance" and "Champerty," and on 403 and 404 he lays down the law in relation to champerty and maintenance, and prohibition of rights of action being assigned or purchased, and concludes:

> "The ancient idea that litigation is thereby encouraged is utterly without foundation. An action

by the vendee would do no more harm than an action by the vendor." (Pp. 403-404.)

Although Judge Hitchcock thought, and perhaps rightly at the time he gave his decision, that the law was different in most other states; at the time of this transfer the law of substantially all the states was concordant that the fact that the validity or amount of a chose in action, or the title of the vendor to either personal or real property was disputed by the person in possession thereof, did not invalidate a transfer otherwise valid. So universally is this true, that we do not think it necessary to cite authorities to the court on this point, unless contrary to our expectation it may be controverted by counsel for defendants in error.

B

It Was Not Void for Maintenance or Champerty, Either by the Law of Ohio or by the General Law.

The assignment being of the whole of the claim instead of only part, it did not come within the original definition of champerty.

> "Champerty (*campi partitio*) is properly a bargain between a plaintiff or defendant in a cause *campum partire*, to divide the land or other matter sued for between them if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense."
>
> 3 *Story Equity Jurisprudence* (14th Ed.) Sec. 1411, p. 69-70.

Obviously, this has not in terms any application to cases where the whole claim is brought, and, accordingly, Mr. Justice Story says, in his note to this section:

> "It would seem that where a party purchases the whole matter in controversy and brings the suit

not to support the title of another but to support his own title, the case would not fall within the predicament either of maintenance or champerty, as thus defined by Mr. Russell or by Mr. Justice Blackstone, although it may be within the scope of the offense described by Hawkins, or of the Statute of 32 Henry VIII. ch. 9, respecting the buying or selling of pretended or disputed titles."

3 Story Equity Jurisprudence, (14th Ed.) Sec. 1411, Note 3, p. 70.

Again, he says:

"But consistently with these principles a party may purchase by assignment the whole interest of another in a contract or security or other property which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs, or make any advances *beyond the mere support of the exclusive interest which he has so acquired.*" (Italics ours.)

3 Story Equity Jurisprudence, (14th Ed.) Sec. 1414, p. 73.

The author, in note 6, also criticizes the case of *Arden vs. Patterson,* 5 Johns. Ch. Rep. 44, relied upon by the trial judge in the way in which it is explained here in this brief. *3 Story Equity Juris.,* (14th Ed.) Sec. 1414, pp. 73-4; note 6.

See *11 Corp. Jur.,* 234, note 16.

The assignment then was in itself neither champertous nor maintenance.

We adopt, as part of our argument on this subject, the opinion of the learned Court of Appeals, found on pages 268 and 269 of the Record:

"The common law from a very early period made it a crime designated as common barratry, to

induce others to commence even just suits if done with an oppressive motive, and it punished the offender by fine and imprisonment. And by statute, 12 Geo. I. C. 29, it was enacted that if one who was convicted of common barratry practiced as an attorney or solicitor in any suit he should be transported for seven years. And so the common law also punished as a crime the offense of maintenance which is described by Blackstone as 'an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.' 4 Blackstone 135. This he declares is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of law into an engine of oppression. Champerty, a species of maintenance, was also punished by the common law. 'It signifies,' Blackstone says, 'the purchasing of a suit, or right of suing; a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, '*qui improbe coeunt in alienam litem, ut quic quid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur.*' Those who knavishly interfere in other men's suits, for the purpose of sharing whatever may be awarded by the verdict, are liable to the *Julian law de vi privata;* (of secret influence); and they were published by the forfeiture of a third part of their goods, and perpetual infamy.'

"In Sherman's Roman Law in the Modern World, Vol. 2, p. 456, it is said 'An agreement with a client that remuneration for conducting his law

suit should be a certain portion of the proceeds *(Pactum de quota litis)* was forbidden; an advocate making such an agreement was disbarred. This Roman prohibition, designed to uphold the honor of the legal profession, has exerted a strong influence in modern law.' And see Mackenzie's Roman Law, p. 446.

"In maintenance no personal profit is expected or stipulated. The motive is simply to aid a party, with money or otherwise, to prosecute or defend his suit. *Spicer vs. Jarrett*, 61 Tenn. 454, 457. And in champerty there is a bargain with the plaintiff or defendant by which the champertor is to carry on the suit at his own expense and is to derive some profit out of the thing sued for if he prevails. *Roberts vs. Cooper*, 20 How., 467, 484. *Breeden vs. Frankford Marie, &c. Insurance Co.*, 220 Mo., 327. And see 11 C. J. 234. And a champertous agreement is of course void and unenforcible.

"In *Peck vs. Henrich*, 167 U. S., 624, 630 (1897), the Supreme Court declared that 'according to the common law, as generally recognized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful and void, as tending to stir up baseless litigation.' "

See further, for definition of maintenance, *3 Story Eq. Juris.* (14th Ed.) Sec. 1411, p. 70 and notes.

And this is the uniform ruling in Ohio:

In *Reece vs. Kyle*, a client assigned to his attorney one-half of a claim, in consideration of the attorney agreeing to render legal services in an effort to collect the claim and to advance costs and expenses in the first

instance, one-half to be repaid by the client in case of failure, and the net proceeds, in case of success, to be equally divided between counsel and attorney. Held, not to be unlawful on the ground of champerty and if otherwise valid would be enforced.

Reece vs. Kyle, 49 O. S. 475.
Railway Co. vs. Wolcott, 58 O. S. 362.
Healey vs. Robinson, 11 O. N. P. (N. S.) 329.

Ohio cases which will be cited by counsel for defendants-in-error as adverse to this are:

Key vs. Vattier, 1 O. R. 58.
Weakley vs. Hall, 13 O. R. 167.
Stewart vs. Welch, 41 O. S. 483.
Pennsylvania Co. vs. Lombardo, 49 O. S. 1.
Brown vs. Ginn, 66 O. S. 316.
Davy vs. Insurance Co., 78 O. S. 256.

These cases are obviously not in point, for in none of them was there an absolute and real assignment of the whole of the claim, but, on the contrary, the assignor remained in fact the owner either of the whole claim, as in *Brown vs. Ginn*, or of part of the claim, as in *Key vs. Vattier*, *Weakley vs. Hall*, *Pennsylvania Co. vs. Lombardo*, *Stewart vs. Welch* and *Davy vs. Insurance Company*, and he was indemnified against costs and expenses, with which he was properly chargeable because of his continuing ownership of the claim or part thereof, and was deprived of the control of litigation in which he was still interested.

Thus we find that, so far as concerns the common law of Ohio, where this contract was made and delivered between persons domiciled in Ohio this contract was not champertous.

Cases like *Arden vs. Patterson,* 5 Johns. Ch. 44, are sometimes cited, as they were by the trial judge who based upon it his ruling in the case at bar, as holding that an assignment otherwise valid and non-champertous became champertous because made to an attorney. Upon examination of that case it will be found that there is no such doctrine declared in that case. In that case a lawyer took an assignment of a claim to a third party in trust for himself; *the client brought an action against the attorney* to have the transfer declared void, tendering back that which had been paid. On the facts of the case the transaction was a fraud practiced by the attorney upon the client, and the client sought to set it aside for that reason. The decision was, as has been frequently pointed out, dependent upon the special fact that the suit was between attorney and client to set aside a purchase which was void as between attorney and client because made for an inadequate consideration and procured by deceit by a person standing in a position of trust and confidence. See *Bayard vs. McLane,* 3 Harr. (Del) 139, 213-14; *3 Story Eq. Juri.* (14th Ed.) Sec. 1414, pp. 73-4, note 6.

Now, does it make any difference, as to the question of champerty or maintenance, whether the purchase is made by an attorney from his client, or by a stranger from client?

In this case any fraud or imposition on the client, is wanting, as is any objection by client as pointed out by the learned Court of Appeals on pp. 266 and 267.

We are now speaking exclusively of the objection that the purchase was void for either maintenance or champerty. Whether its validity is affected by other rules of law, we shall consider in a moment. It is quite obvious from the definitions of "maintenance" and "champerty," and rules based upon them, which have

been referred to, that the relation existing between the vendor and the vendee has no influence upon the question.

We have now disposed of all the questions raised by the parts of the answer hereinbefore quoted.

Is There Any General Policy of the Law Growing Out of the Relations Between Attorney and Client Which, Under the Evidence in This Case, Invalidates This Transfer?

We have already seen that there is no evidence tending to show that the consideration for the assignment was not an antecedent debt; that in such case the agreement is not champertous or maintenance, was conceded by the learned Court of Appeals, in the following portion of its opinion (Record p. 270).

> "If his premise is correct there is very respectable authority which would support his conclusion. Professor Ames in his Lectures on Legal History 258, note 1, states that 'The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance while a similar grant to a purchaser or donee was maintenance.' 34 Hen. VI. 30, 15; 37 Hen. VI. 13-3; 15 Hen. VII. 2-3; *South vs. Marsh* (1590), 3 Leon. 234; *Harvey vs. Beekman* (1600), Noy 52. As late as 1667-1672 the same distinction prevailed also in equity.
>
> In 1 Bacon's Abridg. 360, 361 referring to champerty it is said that 'A g ıt of part of a thing in suit, made in consideration. f a precedent debt is not within the meaning of the statute, but such only as is made in consideration of maintenance.' And again, 'But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain * * * are within the meaning of the statute.'

In 11 C. J. 247 the law is stated as follows:

'A grant or assignment of an interest in the subject matter of the suit, made by the client to his attorney in consideration of a precedent debt, is not contrary to public policy or champertous. Nor is it made so by a statute which prohibits an attorney from buying a thing in action with intent to bring an action thereon; except in payment for services rendered.'

In *Tapley vs. Coffin*, 12 Gray (Mass.) 420 (1859), an attorney and client agreed that the attorney was entitled to $1,240 for past services and that he should have $400 in full satisfaction for future services in certain suits. And in order to secure the payment of these sums the client assigned to the attorney his share in his father's estate then under administration, and it was agreed that the attorney should collect and receive the same and after deducting the necessary expenses and sums of $1,240 and $400 pass over to the client the residue. The court sustained the legality of the agreement and said 'It does not present a case of champerty or maintenance.'

In *Jordan vs. Gillen*, 44 N. H. 424 (1862), the client assigned to his attorney a cause of action sounding in tort the consideration being the discharge of a precedent debt due from the client to the attorney. The transaction was held to be not invalid and that the attorney would have the right to enforce the claim.

The New York Statute Laws of 1818 made the purchase of a chose in action by an attorney a ground of defense against a suit, upon it, but where it was received bona fide in payment of an antecedent debt it was allowed by a proviso in the Statute. See *Watson's Executors vs. McLaren*, 19 Wend. 557, 565 (1838), aff. in 26 Wend. 425.''

The learned Court of Appeals, having thus acceded to this doctrine, proceeds to say (Record p. 271) that it

does not apply to this case because there was evidence tending to show that the consideration was not satisfaction of an antecedent debt.

We have already pointed out that the four items of evidence here referred to by the Court of Appeals, as tending to show that the consideration was not the payment of an antecedent debt, does not refer at all to that proposition, and we repeat that the trial court did not find that the consideration was not the payment of an antecedent debt, but, by implication, found that it was the payment of an antecedent debt, with the super-added intent to bring suit upon the claim, which the trial court thought vitiated the transaction.

We have said all that we desire to say upon this subject of the intent to bring suit, if necessary, affecting in any degree the validity of the purchase of a chose in action. The question now under consideration is merely whether or not a purchase of a chose in action from a client, which is not at all objectionable as between attorney and client, i.e. as between its owner, a client, and his attorney, is vitiated as to third persons by some rule of law.

We accept absolutely and implicitly, and as strongly as it can be laid down, that transactions between attorney and client are to be carefully, rigidly, and even suspiciously, scrutinized by the court. But this means that they are to be so scrutinized as between attorney and client, to establish whether or not the fiduciary relation existing between attorney and client has in any way contributed to, induced or influenced the transfer. Having found that it didn't, as it must be found, to make the transaction valid as between attorney and client, is there any policy of the law which says that under such circumstances third persons, as to whom no fiduciary, but an adversary, relation exists, can question the transfer.

As applied to the facts in this case, what seems to us to be a striking and controlling argument against such a theory, is that thereby a wrongdoer escapes the possibility of having to redress his wrong in proportion to the extent of the injury and the incapacity to seek redress that he has caused his victim. It stands admitted here that so great was the injury to plaintiff's assignor's property and business which was inflicted by the defendants, that the plaintiff's assignor was thereby prevented from seeking redress in courts of justice. It could not, bring an action against defendants for redress, paying plaintiff a contingent fee, and prosecute the action to final judgment, as suggested by the trial court, because the defendants had wrongfully deprived them of the means so to do. The argument is that a rogue must go unwhipped of justice, if he succeeds in sufficiently damaging his victim.

The uncontradicted evidence, as hereinbefore pointed out, and as stated by the learned Court of Appeals, was that plaintiff had a just claim against his assignor for $9,000 or $10,000; that, in consequence of the poverty of his client, he was willing to compromise this for $5,000.00 in cash, his client, on account of the wrong doing of defendants, was not able to pay that, and asked the plaintiff to accept a transfer of this cause of action for a release of this claim for fees, to which consideration plaintiff acceded. There is no suggestion of any misrepresentation, nor of any ignorance on the part of plaintiff's assignor as to the validity of the claim, or its extent, to the contrary, the officers of the plaintiff's assignor state that plaintiff told him that, in his opinion, plaintiff's assignor had a good cause of action against these defendants. The books of plaintiff's assignor, with which they must suppose to have been familiar, showed

the existence of a claim against the defendants in behalf of plaintiff's assignor of $100,000.00.

The learned Court of Appeals conceded that, as between plaintiff's assignor and plaintiff, there was a valuable consideration. A striking case upon this subject is found in the proceedings of the Supreme Court of Ohio in *Judy vs. Louderman*, 48 O. S. 562, 573, 574.

The Court of Appeals says that ordinarily the adequacy or inadequacy of consideration is no affair of third parties, but thinks that in this case there is a policy of law involved. What that policy is is undefined.

The Statutes of Ohio, and we think the statutes of all states, provide for the sale of desperate claims by executors, administrators, receivers, assignees for the benefit of creditors. The same thing is true of Trustees in Bankruptcy. If a person or attorney buys a claim of this sort for a trifle, does the fact that it ultimately turns out that the claim is good, in any way affect the validity of the purchase? Does the fact that the fortunate purchaser is an attorney at law in any wise affect the result, where the fact of the existing relation of client and attorney, or of the fiduciary relation, is not at all involved? Indeed, let us see to what the suggestion of the trial court and the apparently implied, but not expressed, opinion of the Court of Appeals leads us. If the claim against defendants has been less than, or only equal to, or only a little more than the amount of Sampliner's claim against his client, which was cancelled by the purchase, apparently there would be no policy of the law opposed to the validity of the claim.

This amounts to saying that if the wrongdoer does a small damage the claim is assignable, because in that event the purchase of the claim is not speculative, but if the damage and the difficulty of establishing its amount

are great, then the purchase is void because in that event speculative. So that the greater the wrong and damage, the greater the immunity from making reparation. The forcible language of a New York Court in a very similar case is very applicable here,

> "It would be a very singular thing if the statute aimed to prevent oppression and fraud could be invoked as a defense and used as a shield to protect successful fraud. The law has never been so unreasonable."
>
> *Benedict vs. Guardian Trust Co.*, 91 N. Y. App. Div. 103, 108; S. C. 86 N. Y. Supp. 370, 374.

Perhaps we should add to this suggestion of the court an implication that if the claim was liquidated, and less than, equal to, or slightly more than the amount of Sampliner's claim against his client, there would be no policy of law which would interfere with the validity of the assignment. If it be true, as it is without question, that unliquidated claims sounding in contract or sounding in tort, are as assignable as liquidated claims, then the fact that the amount of possible recovery against defendants, depending upon the opinion of a jury as to the extent of the damage, cannot in any way affect the plaintiff's right to recover against defendants. If it be true, as conceded by the Court of Appeals, that the amount of profit made by the attorney as a result of his purchase valid as between attorney and client, does not affect the validity of the transfer as between client and attorney, what rule of law is there that says it affects the validity of the transfer as between the attorney and third parties? If it be true that a purchase of a desperate claim, or any other claim, by an attorney at law is valid, the purchase being fair and no violation of any fiduciary relation, how can the amount of the profit which he makes

by the purchase constitute a defense to a third party. The legislative branch, which we suppose determines the policy of the law, has said that for damage inflicted in violation of the terms of the Anti-Trust laws, the injured party may recover treble damages. The court may think that this is harsh, but we do not know of any right of courts for that reason to refuse to enforce the law, and we do not observe in the statute any provision that one class of persons shall be entitled to treble damages, and another class not.

We have now considered all the reasons urged in support of the action of the trial court, either by that court, or by the learned Court of Appeals. We have not been able to find any support for that, either in the general law, or in the law of Ohio. We have apparently ascertained that by both laws the purchase of a controverted claim was lawful, at the time of this transaction; that if it was an out and out purchase, it was neither maintenance nor champerty, even though the purchaser intended, if he cannot get his money otherwise, to bring an action in his *own* behalf on a claim which *he alone* owned; that there is no policy of law which says that transactions valid between attorney and client, not savoring of maintenance and champerty, can be questioned by the person against whom the claim exists, and that the amount of profit that the attorney may make in such case by the purchase is no concern of the defendant, and that in this case, to deny the plaintiff's right to recovery is to rule that a wrong-doer who has admittedly for the purpose of this proceeding, admittedly damaged the plaintiff's assignor in property and business to the amount of over $100,000, shall not be required by a court of justice to make atonement because the person who is injured has been so injured that it is unable to prosecute an action in a court of justice for redress.

Every lawyer knows that of the claims which are unliquidated, and depend upon the opinion of a jury, only a small proportion get into court and a very large per cent are settled between the parties without suit.

This brings us to the last question on this part of the case.

Is This Claim Assignable?

It is said by the learned District Court:

> "The attorney knows much better than his client can possibly know the value of a particular cause of action, and the chances as to its successful prosecution in the particular case." (Record p. 272).

The facts in this case show that the books of the client showed better than the attorney knew what was the value of the particular cause of action, and shows also that the attorney advised the client that it had a good cause of action, and that it could probably recover in an action, the expense of which would be about $10,000.00. There is no claim that the action brought at that time would not have cost that amount of money. It may or may not be true that the subsequent decision in the action brought by the United States against these same defendants for these same matters has diminished the probable expense.

The learned Court of Appeals says:

> "It would be a gross impropriety in a judge to buy a law suit."

About that there can be no dispute. The court further said that

> "The impropriety may be less in degree but it is none the less an impropriety for an attorney who is an officer of the court and a minister of justice to *speculate in the suits of his client.*" (Italics ours).

Again we say we do not know what is meant by this word "speculate." The court has previously said that an attorney had a right to buy from his client a claim in payment of a pre-existing debt of his client. That is the case at bar. So far as we know the unbroken current of authority is that whether that claim is liquidated or unliquidated, and sounding in contract or sounding in tort makes no difference; and, so far as we know, no court has undertaken to say that the extent of possible profit made, either by a third person or by the attorney, as the purchaser of a claim, in any way affects the validity of a purchase. We do not suppose there ever was a purchase and sale in which the purchaser did not expect to make something by the purchase. If that expectation is wanting, there is no reason for making the purchase.

It is quite evident that the language of the trial court and of the Court of Appeals, in relation to speculation, is based upon the fact that if plaintiff is able to establish, to the satisfaction of a jury, that defendants damaged their assignors in property and business to the extent alleged in the complaint, he would be entitled, under the Sherman Anti-Trust Act, to treble damages, and, as a consequence, would make a very large gain indeed over the price paid for the claim and the expense of enforcing it, while he would probably make a much smaller gain, indeed probably not a large gain, if defendants were wise and met him in the gate and adjusted the differences. It was with an idea of this sort that the old common law granted parlances between plaintiff and defendant after suit was brought.

That claims for torts which are injuries to property or business, and not for personal injuries, are assignable, has been held repeatedly by this Court. To mention but a few, thus assignments have been upheld for claims for illegal seizure of property in—

Judson vs. Corcoran, 58 U. S. (17 How.) 612-614.
Lewis vs. Bell, 58 U. S. (17 How.) 616-617.

For the illegal seizure of personal property—
Erwin vs. U. S. 97 U. S. 390-396.

and even of claims for robbery and murder:
Peugh vs. Porter, 112 U. S. 737.

We hardly think it will be asserted that claims sounding in tort other than by injuries to the person or reputation are not assignable. That the claim for treble damages under the Sherman Anti-Trust Law is not a penal action but a civil action for damages, remedial in its character, was held in *City of Atlanta vs. Chattanooga Fdry. & Pipe Co.,* 101 Fed. 900, 902, 906. This part of the opinion was expressly approved on appeal and reiterated in *City of Atlanta vs. Chattanooga Fdry. & Pipe Works,* 127 Fed. 23-28, 29, in the opinion by Judge Lurton, and again approved by this Court in *Chattanooga Fdry. & Pipe Works vs. City of Atlanta,* 203 U. S. 390, 393-394.

See also:
Thornton, Sherman Act. Sec. 421.
United Copper & Securities Co. vs. Amalgamated Copper Co., 232 Fed. 574, 577-8.
Imperial Film Exchange Co. vs. General Film Co. 244 Fed. 985.
Huntington vs. Attrill, 146 U. S. 657.
Brady vs. Daly, 175 U. S. 148.

So it is held that they survive to an executor or administrator:
United Copper Securities Co. vs. Amalgamated Copper Co., 232 Fed. 574, 576-8.

And it has been directly held in two inferior courts, and also in the case at bar, that an action for claims for

treble damages under the Sherman and Clayton laws, is not a penal action, but a civil action for damages:

City of Atlanta vs. Chattanooga Fdry. & Pipe Co., 101 Fed. 900, 902, 906.

Imperial Film Exchange Co. vs. General Film Co., 244 Fed. 985.

Indeed, the whole contention that such claims are not assignable is based upon an administration of the law which has long since disappeared, and with its disappearance has vanished its consequences.

We again refer, for a good review of this progressive change in the law, to the opinion of the Supreme Court in *Reece vs. Kyle*, 49 O. S. 475, 481 to 484, pointing out that earlier decisions in Ohio were not longer law, because of these changes in society and the administration of the law. Similar views have been expressed by this Court.

This brings us to the second underlying contention of the Plaintiff in Error.

II. IF THERE WERE ANY QUESTIONS OF FACT TO BE DECIDED OR DIVERGENT INFERENCES OF FACT TO BE MADE THE DISTRICT COURT ERRED IN NOT SUBMITTING THEM TO THE JURY.

In support of the above proposition we submit that

A. The fact that each party moves for a directed verdict does not deprive either party of the right to have questions of fact submitted to the jury.

B. The plaintiff in error made a sufficient request to have the case submitted to the jury.

C. The failure to submit the case to the jury was prejudicial to the plaintiff in error.

D. A sufficient exception to the action of the District Court was preserved and is presented to this Court.

We shall take up the authorities and refer to the facts in proof of these contentions in their respective order.

A. The Fact That Each Party Moves for a Directed Verdict Does Not Deprive Either Party of the Right to Have Questions of Fact Submitted to the Jury.

It is clearly settled that if both parties request a directed verdict and *nothing more is done,* the case is thereby submitted to the Court and the only question left for the upper Court is one of law, whether there was any substantial evidence to support the finding of the lower court; in such a case the Court respects the finding of the lower Court in the same way and to the same extent which it ordinarily respects the finding of a jury. The leading case in this Court on this point is

Beutell vs. Magone, 157 U. S. 154 (1894).

The Syllabus reads:

> "When each party asks the court to instruct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the jury to find a verdict for one of them, both are concluded on the finding of facts."

Admitting this principle as settled, it is equally well established that if either party asks to go to the jury either after or before the court has ruled on the motions to direct a verdict, the court must allow the case to go to the jury if as stated by the learned Court of Appeals (Record p. 294), "The evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom."

The leading case in this Court is

Empire State Cattle Co. vs. Atchison, Topeka & Sante Fe Ry. Co., 210 U. S. 1 (1907).

In this case the syllabus reads:

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom. *Buettell vs. Magone*, 157 U. S. 154, distinguished."

The Court said (pp. 8 and 9):

"It was settled in *Beuttell vs. Magone, supra*, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell vs. Magone*, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell vs. Magone* has been pointed out in several recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, in *Minahan vs. Grand Trunk Ry. Co.*, 138 Fed. Rep. 37, 41, and was also lucidly stated

in the concurring opinion of Shelby, Circuit Judge, in *McCormick vs. National City Bank of Waco*, 142 Fed. Rep. 132, where, referring to *Beutell vs. Magone*, he said (p. 133):

'A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in *Beutell vs. Magone, supra*, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

In New York there are many cases showing conformity to the practice announced in *Beuttell vs. Magone*, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. *Kirtz vs. Peck*, 113 N. Y. 226; *S. C.*, 21 N. E. 130; *Sutter vs. Vanderveer*, 122 N. Y. 652; *S. C.*, 25 N. E. 907.

The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. *Minahan vs. G. T. W. Ry. Co.* (C. C. A.), 138 Fed. Rep. 37.'

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sus-

tained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiff."

The rule, as it is established in *Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co., supra*, has been repeatedly recognized by this Honorable Court.

Sena vs. American Turquois Co., 220 U. S. 497. (1910).

The Court in this case rested its opinion expressly upon the fact that both parties moved for a directed verdict, and *"there was nothing more."*

Schmidt vs. Bank of Commerce, 234 U. S. 64. (1913) (Reversing 16 New Mex. 414).

The chief contention of the plaintiff in error, in this case both in the territorial court and in the Supreme Court of the United States, as shown by the opinion in 16 New Mex. 414, was that there was an issue of fact which the Court should have submitted to the jury. After the trial Court had announced that it sustained the motion for a peremptory instruction in favor of the plaintiff, counsel for defendants (plaintiff in error), insisted that they were "entitled to a decision at the hands of the jury in this case." This contention was overruled by the trial Court and a verdict instructed against the defendants. The Supreme Court of the territory said, (16 New Mex. 421).

> "We are of the opinion that upon this state of the record, the request by both sides for a peremptory instruction, does not preclude the assignment of error made."

(i. e. the assignment that the case should have been submitted to the jury.)

The Court went further, however, and held that as there were no material questions to be submitted to the

jury, the error was not prejudicial. This Court, however, reversed the decision of the Territorial Court, holding that there were material questions of fact, and that these should have been submitted to the jury.

The Court said (page 66):

> "The Supreme Court of the Territory also held that although both parties had requested peremptory instructions, the defendants were entitled, upon the denial of their motion, to ask that the case be submitted to the jury and that this request was properly made. See *Empire State Company vs. Atchison Company*, 210 U. S. 1."

And again at Page 70:

> "For these reasons we think that they were entitled to have the evidence as to fraudulent representation submitted to the jury and that the direction of the verdict in favor of the plaintiff was error."

In this case then we have an express holding by this Court as recently as 1913 that a request to go to the jury, *even after the motions for a directed verdict had been ruled upon* preserves the right to have the case submitted to the jury.

Williams vs. Vreeland, 250 U. S. 295 (1919). The Court said, page 298:

> "The established rule is 'where both parties request a peremptory instruction and *do nothing more*, they thereby assume the facts to be undisputed, and in effect submit to the trial Judge the determination of the inferences proper to be drawn therefrom.' And upon review a finding of fact by the trial Court under such circumstances must stand if the record discloses substantial evidence to support it." (Italics ours).

This rule is equally well established by the highest Court in the State of New York.

Brown vs. Reinhardt, 210 N. Y. 162 (1914).

It is also recognized by the Circuit Court of Appeals of practically every circuit in the country, including the Second Circuit.

Siqua Iron Co. vs. Greene, 88 Fed. 207; C. C. A. 2nd Cir., 1898.

Breakwater Co. vs. Donovan, 218 Fed. 340, C. C. A. 6th Cir. 1914.

Minahan vs. Grand Trunk Western Ry. Co., 138 Fed. 37, C. C. A. 6th Cir. 1905.

See also:

Chesapeake & Ohio R. R. Co. vs. McKell, 209 Fed. 514; C. C. A., 6th Cir., 1913.

Southern Pacific Company vs. United States, 222 Fed. 46; C. C. A., 9th Cir., 1915.

Charlotte National Bank vs. Southern Railway Co., 179 Fed. 769; C. C. A., 4th Cir. 1910.

Perkins vs. Board of Commissioners, 80 O. S., 495.

International Battery Co. vs. Westreich, 182 App. Div. 843; 170 N. Y. Sup. 149, 1918.

The rule of law that a party is entitled to have the case submitted to the jury, if a proper request is made therefor, regardless of the fact that both parties have moved for a directed verdict, being established by the above authorities, it remains to be considered whether the plaintiff in error made a sufficient request to have the case submitted to the jury.

B. The Plaintiff in Error Made a Sufficient Request to Have the Case Submitted to the Jury.

After both parties had rested, and both parties had moved for a directed verdict, the following colloquy took place between Mr. Rogers, representing the plaintiff in error, and the trial Court: (Record, p. 169).

"Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any 'ifs.' If you think under Section 973 of the Code, the Court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case.

Mr. Rogers: Then, your Honor, may I state my position on the record?

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule."

It is especially worth while noting here that Mr. Rogers requested to go to the jury upon the exact question of fact which the Court decided adversely to the plaintiff. (Record p. 170.)

Again, after the Court had granted the defendant's motion for a directed verdict, Mr. Rogers said (Record p. 172):

"Mr. Rogers: I except to the direction, and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be."

The only fault which the Court found with Mr. Rogers' requests to go to the jury, was the fact that they were conditional, and this would seem to be the only fault which could be found with them. It is necessary to consider, therefore, whether or not a conditional request is sufficient to preserve a party's right to go to the jury.

The case of *Empire State Cattle Company vs. Atchison, etc., Ry. Co., supra*, was decided by the Circuit Court of Appeals for the Eighth Circuit in 147 Fed. 457 (1906). The court in that opinion stated what happened at the trial, as follows (p. 459):

"At the conclusion of the evidence the plaintiffs preferred a written request that the court direct a verdict in their favor and by a separate writing also asked that 13 other instructions directed to particular features of the case be given to the jury. The defendant likewise asked that a verdict be directed in its favor. After an extended consideration of both requests for a directed verdict the court denied the plaintiffs' and sustained that of the defendant. The special requests of the plaintiffs were denied. A verdict was accordingly returned for the defendant, and it had judgment."

This was clearly a conditional request upon the part of the plaintiff to go to the jury. The Circuit Court of Appeals held that the case had been submitted to the court and that there was no error in the court refusing to let it go to the jury. The court said (pp. 459-60):

> "It is said, however, that by submitting the 13 requests for special instructions the plaintiffs showed their purpose not to so invoke the action of the court that they would be thereafter precluded from going to the jury. Some warrant for this contention may be found in the cases from the second circuit, in each of which it is recited either in the opinion or in the preceding statement that when the requests of both parties for a directed verdict were made neither of them requested that any question of fact should be submitted to the jury. The qualification, if it be one, suggested by these cases seems to have had its origin in a rule of practice obtaining in the State of New York, in which all of them arose. *Sutter vs. Vanderveer*, 122 N. Y. 652, 25 N. E. 907; *Kirtz vs. Peck*, 113 N. Y. 222, 21 N. E. 130; *Koehler vs. Adler*, 78 N. Y. 287. The Court of Appeals of the Sixth Circuit came to a similar conclusion in *Minahan vs. Railway*, 138 Fed. 37, though the case there was peculiarly circumstanced. • • •
>
> We are of the opinion that where both parties invoke the action of a trial court by requests for a directed verdict, and the request of one of them is accompanied, as in this case, or followed by requests for other instructions to the jury, such other requests do not, by themselves, amount to a withdrawal of the one for a directed verdict. The request for a directed verdict is first in insistence upon the attention and action of the court."

The Supreme Court, although it did not reverse this case, did hold as indicated by its language quoted above that the ruling of the Circuit Court of Appeals was error

and that there had been a sufficient request by the plaintiff to go to the jury. This case therefore very clearly establishes the rule in the Supreme Court of the United States that a request by a party to go to the jury, conditioned upon refusal of his own motion for a directed verdict, is a sufficient request to save such party's rights. There are some cases from the Circuit Court of Appeals of other circuits indicating that this rule is generally adopted in the Federal Courts.

Southern Pacific Co. vs. United States, 222 Fed. 46; C. C. A., 9th Circ., 1915.

The syllabus reads:

"The rule that a motion by each party for a directed verdict in his favor is equivalent to a request for findings of fact by the court, and that, if the court directs a verdict for one party, both parties are concluded on the findings of fact, was not applicable, where defendant's motion was accompanied by a request for leave to go to the jury if the motion was denied."

The court said (pp. 47-48):

"The case was tried before the court and a jury. At the close of the evidence the plaintiff moved for a directed verdict in its favor upon each of the causes of action here involved. A similar motion was made by the defendant, with the further request that, in case such motion be denied, it have leave to go to the jury. The motion of the plaintiff was granted, and that of the defendant, including the motion for leave to go to the jury, was denied. The rule that, where each party asks the court for a peremptory instruction for a directed verdict in his favor, the proceeding is equivalent to a request for a finding of facts by the court, and, if the court directs the jury to find a verdict for one of the parties, both are concluded on the findings of fact (*Beuttell vs. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654), is not applicable

here, in view of the additional motion of the defendant that in case its motion for a directed verdict in its favor be denied it have leave to go to the jury. *Empire State Cattle Co. vs. Atchison Ry. Co.*, 210 U. S. 1, 8, 9, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70."

Bank vs. Maines, 183 Fed. 37; C. C. A., 6th Circ. 1910.

The syllabus reads:

"Where at the close of all the evidence in addition to requests for special instructions touching disputed facts in issue, both sides presented motions for a directed verdict, the court erred in treating the motion as a joint consent to submit the facts to the court."

Chesapeake & Ohio Railroad Co. vs. McKell, 209 Fed. 514; C. C. A., 6th Circ., 1913.

The syllabus reads:

"Requests by both parties for an instructed verdict do not amount to a withdrawal of all questions of fact from the jury, where it appears that such was not the intention of a party, and that it was not so understood by the court."

It does not appear from the syllabus or from the opinion just what occurred at the trial, but the inference from the syllabus is that there will be error if a party has made his desire to go to the jury sufficiently clear so that the court could understand it. There was no possible doubt in our case but that the court understood that plaintiff wanted to go to the jury.

Charlotte National Bank vs. Southern Ry. Co., 179 Fed. 769; C. C. A., 4th Circ., 1910.

The court held as stated in the syllabus:

"Where both parties at the close of the testimony request peremptory instructions in their favor, but also at the same time ask for special

charges to be given in the event that the peremptory requests are denied, some of them relating to conflicting evidence from which divergent inferences could be drawn, such peremptory requests do not affirm that there are no disputed questions of fact which should be submitted to the jury."

In the case of *Schmidt vs. Bank of Commerce, supra,* the only request to submit the case to the jury came after the court had ruled upon the motions for a directed verdict and the court held such a request sufficient to preserve the right to go to the jury.

It thus clearly appears that the doctrine laid down in the case of *Empire State Cattle Co. vs. The Railway, supra,* has been applied in *most* cases where there was actually a conditional rather than an absolute request to go to the jury, and it is submitted, therefore, that the conditional request made on behalf of the plaintiff in error at the time of the trial was a sufficient request to entitle him to have the case submitted to the jury.

It being established that the plaintiff in error had the right to have the questions of fact submitted to the jury, and that a proper request for such submission was made, it remains to be considered whether the failure to submit the case to the jury was prejudicial to the plaintiff in error.

C. The Failure to Submit the Case to the Jury Was Prejudicial to the Plaintiff in Error.

As appears by the record, the trial Court made a finding of fact upon which the judgment dismissing the petition of the plaintiff (now plaintiff in error) was based. (Rec. p. 170.)

"The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plain-

tiff purchased this cause of action with intent to sue thereon."

The plaintiff and the officers of his assignor having testified and the assignment in question having recited that the assignment was for the cancellation of a preceding indebtedness, and the plaintiff having testified that he did not at the time contemplate suit unless he could not effect a settlement with the defendants, the conclusion is irresistible that either there was no evidence to prove that his primary intent was to sue and not to obtain payment of his debt, or else the evidence on the issues joined was conflicting or divergent inferences might be drawn therefrom.

It is upon this finding of fact that the opinions of the District Court and the Circuit Court of Appeals are based, and, as abundantly appears from the foregoing portions of this brief, there was ample evidence before the Court justifying a contrary finding of fact, and it was, therefore, prejudicial to the rights of this plaintiff in error to refuse to allow the submission of this question of fact to the jury.

D. A Sufficient Exception to the Action of the District Court Was Preserved and Is Presented to This Court.

As seen above, under B *supra,* counsel for plaintiff in error on the trial requested to have the questions of fact left to the jury, and excepted to the action of the Court in failing to leave the questions to the jury. Assignments of Error, Nos. 51 and 52 (Rec. pp. 250, 251) on the writ of error to the District Court, assigned for error the action of the trial Court in refusing to submit the case to the jury, and also the action of the trial Court in making a finding of fact.

Assignments of Error, Nos. 3, 15, 17 and 18 on the writ of error from this Court to the Circuit Court of Appeals, assigned as error the failure of the Circuit Court of Appeals to reverse the decision of the District Court upon the same question.

CONCLUSION.

It is submitted, therefore, on behalf of the plaintiff in error that the judgment of the Circuit Court of Appeals should be reversed for the following reasons:

I. The Defendants in Error Failed to Produce Any Substantial Evidence in Support of the Defense of the Illegality of the Assignment and the Trial Court Should Have Directed a Verdict for the Plaintiff Upon This Issue.

II. If There Were Any Questions of Fact to Be Decided or Divergent Inferences of Fact to Be Made the District Court Erred in Not Submitting Them to the Jury.

Respectfully submitted,

JOHN G. WHITE,
AUSTIN V. CANNON.

FILED
APR 29 [illegible]
JAMES D. MAHER,
CLERK.

No. [illegible]89

IN THE

Supreme Court of the United States

JOSEPH H. SAMPLINER,

Plaintiff-in-Error
(Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, THOS. A. EDISON, INC., KALEM COMPANY, PATHE FRERES, FRANK L. DYER, HARRY N. MARVIN, JEREMIAH J. KENNEDY, WILLIAM PELZER, JACQUES A. BERST, ALBERT E. SMITH AND PERCIVAL L. WATERS,

Defendants-in-Error
(Defendants Below).

BRIEF FOR THE DEFENDANTS-IN-ERROR

In Error to the United States Circuit Court of Appeals for the Second Circuit

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorneys for Vitagraph Company of America, Albert E. Smith.

ROBERT H. McCARTER,
Attorney for Thos. A. Edison, Inc., Frank L. Dyer and Harry N. Marvin.

CHARLES F. KINGSLEY,
Attorney for Motion Picture Patents Company, Biograph Company, Jeremiah J. Kennedy, William Pelzer and Percival L. Waters.

HOWARD THAYER KINGSBURY,
CHARLES E. SAMUELS,
Attorneys for Pathe Freres and Jacques A. Berst.

ALFRED F. W. SEAMAN,
Attorney for Kalem Company.

Press of Isaac Goldmann Co., 149 William Street, New York.

TABLE OF CONTENTS.

PAGE

Statement of Case 1

The Law of the Case:

I. Since no question of interpretation of the Sherman Act, or other question of Federal jurisprudence as such, is presented for review, in the absence of plain error the judgment of the Court below should be affirmed..... 3

II. The record presents no error..... 5

Index of Authorities Cited.

Ab Anastasio, cod., 4, tit. 35, l. c. 23 10

Anderson v. Radcliffe, Ell. B. & E., 806, 818 14

Arden v. Patterson, 5 Johns. Ch., 47 ..... 15, 17

Bacon Abridgement of Law, Vol. 6, p. 415, tit. Maintenance 11

Bankers' Mut. Casualty Co. v. State Bank of Goff, 150 Fed., 78 32

Barker v. Barker, 14 Wis., 131 ..... 15, 18

Beuttele v. Magone, 157 U. S., 154 32

Blunk v. McDonald, 18 Ohio D. N. P., 109 24

Bradley Timber Co. v. White, 121 Fed., 779..... 32

Brown v. Ginn, 66 Ohio St., 316 24

Case of The Clara A. M'Intyre, 94 Fed., 552.... 15, 19

Chicago Junction Ry. Co. v. King, 222 U. S., 222-224. 3

Chicago Rock Island & Pacific Ry. Co. v. Brown, 229 U. S., 317 3

PAGE

Craig v. Thompson, 42 N. S., 150, 155 13

Cresinger v. Welch, 15 Ohio, 156 26

Davy v. Insurance Co., 78 Ohio St., 256, 267..... 24

Empire State Cattle Co. v. R. R. Co., 147 Fed., 457.32, 33

Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S., 1-10 36

Emslie v. Ford, 1 Ohio C. C. (N. S.), 603..... 24

Gammons v. Johnson, 76 Minn., 76 ..... 15, 23

General Film Co. v. Sampliner, 232 Fed., 95..... 30

General Film Co. v. Sampliner, 252 Fed., 443..... 30

Hall v. Ashby, 9 Ohio, 96..... 25

Healy v. Robinson, 11 O. N. P. (N. S.), 329 25

Hospes v. Mfg. Co., 48 Minn., 174 21

Hoyt v. Thompson, 3 Sandf. S. C., 416, 429....15, 21, 18

Key v. Vattier, 1 Ohio, 58 24

Lampet's Case, 10 Co. Rep., 46, 48 10

Lewis v. Lewis, 15 Ohio, 715 24

Marande v. Texas & P. R. Co., 184 U. S., 191..... 37

McCormick v. National City Bank, of Waco. 142 Fed,, 132 32

McGuire v. Blount, 199 U. S., 142, 148..... 37

Meloche v. Deguire, 34 Can. S. C., 24, 37..... 15, 22

Ong v. Worden, 55 Ohio St., 695..... 24

Penn Co. v. Lombardo, 49 Ohio St., 1..... 24

Per Diversas, cod., 4, tit. 35, l. c. 22..... 10

PAGE

Poe v. Davis, 29 Atl., 676 ..... 14, 15

Propeller v. Mohawk, 75 U. S., 153, 162 ..... 14, 15

Railway Co. v. Volkert, 58 Ohio St., 362 25

Reece v. Kyle, 49 Ohio St., 475, 487 ..... 14, 26

Sande "De Actionum Cessione," cap., 11, 12..... 10

Sampliner v. Motion Picture Patents Co. et al., 243 Fed., 277 30

Sampliner v. General Film Co. (pending)..... 30

Seaboard Air Line Ry. v. Moore, 228 U. S., 433..... 3

Simpson v. Lamb, 7 Ell. & Bl., 84 13

Southern Pacific Co. v. Pool, 160 U. S., 438..... 37

Southern Railway Co. v. Gadd, 233 U. S., 572 3

Stewart v. Welch, 41 Ohio St., 483, 484, 503..... 24

Tapp on Maintenance, 5, 6..... 10

Tapp on Maintenance pp. 83-84 13

Taylor v. Perkins, 171 Mo. App., 246 ..... 15, 22

Texas & Pacific Ry. Co. v. Howell, 224 U. S., 577.... 3

Thallhimer v. Brinckerhoff, 3 Cowen, 623, 648 ....11, 12

Viner's Abridgement of Law & Equity (2d Ed.), Vol. XV, pp. 154, 158, tit. Maintenance.....11, 12

Weakly v. Hall, 13 Ohio, 167, 175..... 9

Wilson v. St. L. & W. Ry. Co., 120 Mo., 45 15

Wintermute v. Humphrey, 1 Ohio Dec. R., 439 24

Wood v. Downes, 18 Ves., 120 13

IN THE

Supreme Court of the United States

JOSEPH H. SAMPLINER,
Plaintiff-in-Error
(Plaintiff Below),

vs.

MOTION PICTURE PATENTS COMPANY, VITAGRAPH COMPANY OF AMERICA, BIOGRAPH COMPANY, THOS. A EDISON, INC., KALEM COMPANY, PATHE FRERES, FRANK L. DYER, HARRY N. MARVIN, JEREMIAH J. KENNEDY, WILLIAM PELZER, JACQUES A. BERST, ALBERT E. SMITH and PERCIVAL L. WATERS,
Defendants-in-Error
(Defendants Below),

BRIEF FOR THE DEFENDANTS-IN-ERROR.

The jurisdiction of this Court rests solely upon the ground that the action is based upon an Act of Congress.

It is based upon Section 7 of the Act of July 2, 1890, commonly described as the Sherman Anti-Trust Act.

But the issues relating to the alleged violation of this Act have not been tried and no question concerning them is presented for review.

On motion of the plaintiff and by consent of the parties (Record, p. 53) the only issues tried were those

based upon the special defense that the assignment of the cause of action sued upon was void for champerty and maintenance and conveyed no title to the plaintiff.

Upon this issue the Trial Court directed a verdict in favor of the defendants at the close of the plaintiff's case after both sides had moved for a direction, and the judgment entered upon this verdict was affirmed by the unanimous opinion of the Circuit Court of Appeals.

The plaintiff-in-error now asserts that his contentions may be grouped under two fundamental exceptions (Brief, p. 21):

(1) The defendants (defendants-in-error) failed to produce any substantial evidence in support of the defense of the illegality of the assignment and the Trial Court should have directed a verdict for the plaintiff upon this issue;

(2) If there were any questions of fact to be decided, or divergent inferences of fact to be made, the District Court erred in not submitting them to the jury.

These questions are not of such character as to justify or to require extensive consideration in this Court.

They present mere questions of procedure and practice which were correctly disposed of below.

We therefore respectfully contend

POINT I.

Since no question of interpretation of the Sherman Act, or other question of Federal jurisprudence as such, is presented for review, in the absence of plain error the judgment of the Court below should be affirmed.

Whenever the pleadings in a case base the right to recover upon an Act of Congress, there is power in this Court to review the judgment of a Circuit Court of Appeals, and this authority imposes the duty to consider and pass upon all questions presented by the record.

In a long line of decisions generally rendered in cases arising under the Federal Employers' Liability Act and the Safety Appliance Act, the Court has held that notwithstanding this power and duty, where no question of interpretation of the statute is involved and only a question of general, as distinguished from Federal jurisprudence, is presented for review, in the absence of plain error the judgments of the Circuit Courts of Appeals are in such cases affirmed.

Chicago Junction Ry. Co. v. *King*, 222 U. S., 222-224;

Texas & Pacific Ry. Co. v. *Howell*, 224 U. S., 577;

Seaboard Air Line Ry. v. *Moore*, 228 U. S., 433;

Chicago, Rock Island & Pacific Ry. Co. v. *Brown*, 229 U. S., 317;

Southern Railway Co. v. *Gadd*, 233 U. S., 572.

While the case at bar arises under the Sherman Act, no question of interpretation is involved.

No question of Federal jurisprudence as such is presented.

Only questions of general jurisprudence which present an inquiry into the existence of any substantial evidence to support a directed verdict, and the question as to whether "if there were any questions of fact to be decided, or divergent inferences of fact to be made" the Trial Court erred in not submitting them to the jury, are involved.

These are mere questions of practice and procedure, for if there is any evidence to support the verdict, both sides having moved for a direction, the facts are no longer open for review.

Moreover, even if there were questions of fact to be decided by the jury, it does not constitute reversible error for the Trial Court to fail to submit them to the jury for determination unless the plaintiff-in-error, by an appropriate request, asked that such questions be submitted to the jury.

The contention is particularly futile in this case where, as we shall presently show, the uncontradicted evidence conclusively establishes the invalidity of the plaintiff's title to the cause of action sued upon, in consequence of which it would have been the duty of the Trial Court to set aside any verdict which might have been rendered in favor of the plaintiff.

The judgment of the Circuit Court of Appeals upon questions similar to those presented here for review, is commonly accepted by this Court as final.

The record presents a proper case in which to apply the principles announced in the authorities cited.

POINT II.

The Record Presents No Error.

Plaintiff-in-error claims that the defendants below failed to produce any substantial evidence to support their contentions of the illegality of the assignment upon which the plaintiff relies and that the Trial Court should have directed a verdict for the plaintiff.

The defendants contend that the evidence adduced conclusively establishes the invalidity of the plaintiff's title to the cause of action sued upon, that the evidence was not susceptible of divergent inferences and that the direction of the verdict in favor of the defendants was proper.

The facts show that the plaintiff is and has been for the last twenty-five years an attorney licensed to practice before the State Courts of Ohio (R., p. 143).

The Lake Shore Company, the plaintiff's assignor prior to 1911, was an Ohio corporation engaged in the motion picture business (R., p. 144).

The defendants are also engaged or interested in the production and in the distribution of photoplays for public exhibition.

Between July, 1908, and December 28, 1911, the plaintiff rendered certain legal services to the Lake Shore Company, for which he was willing to accept $5,000 cash in full payment (R., p. 146).

In the course of his employment as attorney for the Lake Shore Company, he was required to, and did examine, certain agreements between that company and certain licensed moving picture manufacturers (R., p. 144) for the purpose of determining whether the Lake Shore Company had a cause of action against the defendants (R., p. 146).

After having examined these agreements, the plaintiff concluded that they were in restraint of trade and in violation of the Sherman Anti-Trust Act; and that hence the Lake Shore Company had a cause of action against the defendants. The plaintiff so advised the Lake Shore Company and informed it, in addition, that to prosecute such an action it would cost approximately $10,000 (R., p. 146).

The plaintiff formed the impression from the information acquired by him in the course of his consultations with his client, that the damage sustained by the Lake Shore Company as a result of the alleged conspiracy of the defendants was at least $75,000 (R., p. 152), which, when trebled, as provided by the Act, would give a cause of action for at least $225,000.

Thereafter the plaintiff, having this claim against the Lake Shore Company for legal services amounting to $5,000, which the company could not pay (R., p. 147)

> "Went to the office of the Lake Shore Film & Supply Company, and, finding out that Mr. Mandlebaum (president of that company) was in his office, I told Mr. Mandlebaum that I was willing to cancel my obligation under the circumstances against the Lake Shore Company for a transfer of their claim and any rights they have against the motion picture combination."

The Lake Shore Company, in satisfaction of the plaintiff's claim for legal services rendered and certain legal services to be thereafter rendered, if necessity therefor should arise (R., p. 147), executed and delivered to the plaintiff a paper writing, by which it purported to assign to the latter

> "All of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business because of the unlawful combination and monopoly in re-

> straint of interstate commerce and in violation of the Sherman Anti-Trust Act which brought about, engaged in and as a result of the unlawful agreement by and between * * *" (Plaintiff's Exhibit 1, R., p. 172).

twelve specified persons, firms and corporations, among which were included the defendants herein.

In taking this paper the plaintiff knew that the Lake Shore Company was without funds and it was absolutely impossible for it to undertake any litigation (R., p. 146), and that consequently all disbursements and expenses which would accrue in connection with the prosecution of the alleged claim, including the taking of depositions throughout the country, would have to be paid by him (R., p. 155).

Having accepted this assignment on December 28, 1911, the plaintiff, in July, 1913, commenced an action under the Sherman Anti-Trust Act against the General Film Company, as sole defendant, in the District Court of the United States for the Eastern Division of the Northern District of Ohio, to recover $303,000 alleged to be treble the damages sustained by the Lake Shore Company by reason of the alleged conspiracy referred to in the assignment (R., pp. 156, 159).

Thereafter, in January, 1917, the plaintiff commenced the action herein.

In this action, brought to recover damages for the same alleged conspiracy, the plaintiff demands damages not for $303,000, as claimed in the Ohio action, but for $750,000.

It further appears from the record that no demand was ever made, nor was a bill ever rendered, by the plaintiff to the Lake Shore Company for the legal services he alleges he rendered between July, 1908, and December, 1911 (R., p. 84).

Nor was an entry made in the minute book of the Lake Shore Company of the making of this assignment to the plaintiff or of the meeting at which this subject was discussed by the directors of the Lake Shore Company, although that book remained in the possession of the company's secretary for almost three months after the date set forth in the paper writing now known as Plaintiff's Exhibit 1 (R., pp. 94, 95).

Although in March, 1912, all the assets of the Lake Shore Company were sold to a concern known as the Mutual Film Company, and although the president of the Lake Shore Company entered and remained in the employ of the Mutual Film Company as general manager from March, 1912, to March, 1913 (R., p. 140), no disclosure was ever made to the purchasing company of the assignment of the Lake Shore Company purported to have been made to the plaintiff (R., p. 140).

These are the admitted facts of the case and were elicited entirely from the witnesses produced by the plaintiff: William A. Sherman, Emanuel Mandlebaum and Joseph H. Sampliner.

They were the only witnesses in the case, the defendants having produced none.

They indicated the sinister character of the whole transaction and disentitled the plaintiff's ingenious expressions and assertions of innocent intent and purpose to belief.

As has been stated, the defendants in their answer allege, as one of their affirmative defenses, that by the purchase of this cause of action the plaintiff rendered himself guilty of maintenance as well as champerty. So that, even assuming that they failed to establish champerty, it would still remain to be shown that the defense of maintenance likewise failed before a reversal of the judgment would be warranted.

But it is submitted that both grounds of this affirmative defence were fully established, for, as will be shown hereinafter, in the eyes of the law the plaintiff's purchase of the Lake Shore Company's claim involved the offense of maintenance as well as of champerty.

It is the law of Ohio which controls in this case.

In that State, however, owing to the absence of statutory enactment regarding maintenance and champerty, except the limited provisions of Section 12847 of the Ohio Penal Code, it has been repeatedly held that the common law doctrine on these subjects prevail.

In *Weakly* v. *Hall*, 13 Ohio, 167, 175, the Court said:

> "The common law discourages officious intermeddling in the litigation of others, as it clearly ought. *In some of the states they have statutes passed to prevent it, in others not; but where no statutory regulation exists, the common law is, universally, holden to prevail, as imported by our ancestors, and applicable to our local circumstances;* and Bell (the assignee of the chose in action), by the agreement set out in the replication, would seem to be within its provisions.
>
> • • • • • • •
>
> But we take this occasion to say that the law of Ohio will tolerate no lien in or out of the profession, as a general rule, which will prevent litigants from compromising, or settling their controversies, or which, in its tendencies, encourages, promotes, or extends litigation."

Since, however, the reported cases adjudicated by the Courts of Ohio are few in number and limited in scope, it becomes necessary to go to other sources to determine what the common law doctrine of maintenance is.

In the early conception of law a right of action, that is, a right to appeal to the courts for the adjustment of a wrong was considered a right which vested solely in the

individual who had suffered the wrong and therefore was not assignable.

This was the view taken by the founders of Roman jurisprudence.

With the passing of time, and in order to meet the requirements of commerce and the growing exigencies of artificial society, however, modifications of the ancient rule were made, permitting the assignment of certain rights of action.

But, even in Roman days, this important alteration of the rule was found to have its drawback in the facilities it afforded to the operation of a class of men, always marked by Roman jurists with peculiar disfavor, the odious *redemptores litium*—contractors for litigation—whose hateful traffic in buying up disputed claims, was productive of such an intolerable social grievance as to call for the special interposition of the imperial legislation.

Tapp on Maintenance, 5, 6;
Sande "De Actionum Cessione," cap. 11, 12;
Per Diversas, cod., 4, tit. 35, l. 22;
Ab Anastasio, cod., 4, tit. 35, l. 23.

It was from that source that the English common law borrowed many of the maxims for its doctrine of maintenance.

Accordingly, we find the early common law courts of that country ruling that it was against public policy for a party to assign a right of action of whatever nature to a stranger, on account, as it was said, of the encouragement it would afford to maintenance.

Lampet's Case, 10 Co. Rep., 46, 48.

But in that country, as in the Roman Empire, the exigencies of commerce soon began to require modifications of the rule.

So by statutory enactments, as well as by judicial amendations, certain rights were declared assignable, such as those founded on some duty, covenant, debt, obligation or contract, which created a demand capable of being directly liquidated, in contradistinction to rights arising *ex delicto,* which could be satisfied only by the recovery of damages and therefore necessitating the institution of an action.

This letting down of the bars, however, brought into being in England a class of men similar to the Roman *redemptores litium,* and as a consequence we find the common law courts enunciating, along with the modifications of maxim above referred, rules which had for their main purpose the stamping out of the growing traffic of buying up claims upon a speculation.

Bacon Abridgement of Law, Vol. 6, page 415, tit. *Maintenance;*

Viner's Abridgement of Law & Equity (2d Ed.), Vol. XV, pages 154, 158, tit. *Maintenance;*

Thallhimer v. *Brinckerhoff,* 3 Cowen, 623, 648.

In *Bacon's Abridgement of the Law,* it is stated, Vol. 6, page 215:

> "It seems an high offence at common law, as plainly tending to oppression, for a man to buy, *at an under rate,* a doubtful title known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do; and it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested."

Citing: *Moore* 751 Pl. 1031 Hob. 115 Plow. 80.

In *Viner's Abridgement of Law and Equity*, it is said at page 154 (2d Ed.), Vol. XV, tit. *Maintenance*, page 154:

> "If the assignment (of the obligation) *wants a good consideration*, it is void; for it will be maintenance. Arg. 10 Mod. 223 cited 3 Le. 234, Noy 52. Cro. E. 552. 170. 34 H. 6. 30. Br. Maintenance, 8. 1 Bulft. 187.

And at page 158:

> "Buying of debts is maintenance at common law, and punishable by information, and indictment" citing *Jenkin's Rep.*, pl. 108,

In *Thallhimer* v. *Brinckerhoff*, 3 Cowen, 623, 648 (*supra*), the Court said in this connection:

> "They (the rules above cited and others of a like nature) were intended to prevent the interference of strangers having no pretence of right to the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject, otherwise then as purchasers of the profits of litigation."

In order to provide for cases in which the speculator in law suits, instead of purchasing the *whole* cause of action or thing to be sued for, entered into a bargain to maintain the suit of another at his, the speculator's expense, in consideration of their dividing the fruits of the litigation, the courts invoked a rule called champerty.

See

Viner's Abridgement, tit. *Maintenance*, 49, 150.

As otherwise expressed, "Champerty is maintenance aggravated by an agreement to have a part of the thing in dispute."

Craig v. *Thompson*, 42 N. S., 150, 155.

Thus the would-be speculator was left no shrift; if he purchased the *whole* of the right of action or thing to be sued for, the transaction was declared void as against *maintenance* and his suit was dismissed; if he purchased only *part* of the thing in suit, the transaction was declared void because *champertous* and his suit likewise dismissed.

In addition to avoiding transactions tainted with maintenance, the early common law courts held the maintainor liable for damages at the suit of the party against whom the offense was committed. (See the various abridgments above cited.)

In conformity with the policy of the law and the jealously with which the courts have always watched the dealings of counsellors and attorneys, a particular stringency marked the early application of the doctrine of maintenance as to them.

Tapp on Maintenance, pages 83-84;
Wood v. *Downes*, 18 Ves., 120;
Simpson v. *Lamb*, 7 Ell. & Bl., 84.

The former, in fact, were incapacitated to make any contract for compensation with their clients, though they might accept a gratuity, while the latter might make such contract only as the law had made for him in fixing for every service a corresponding fee.

In addition to the common law rule, it was found necessary to pass certain statutes which expressly prohibited the purchase of suits by attorneys or counsellors and making the offense an indictable one.

In this respect Justice Erle declared, in *Anderson* v. *Radcliffe*, Ell. B. & E., 806, 818:

> "The statutes relating to that offence (champerty) were directed against speculations by attornies in suits."

Of course, the doctrine of maintenance as originally expounded had many applications, which have long since been denied and abandoned. This, while due in part to a change in the state of society and in the administration of justice, mainly resulted from the fact that it has been difficult to reconcile the strictness of the doctrine's early maxims with our modern ideas of the rights of property, and the right of the citizen to contract.

Nevertheless, while the doctrine has been pruned of such of its applications as were found to be at a variance with the present rule that a chose in action is as much property as a thing in possession and so can be disposed of as freely, that part of the doctrine which sought to prevent speculative litigation is as much in force today as it ever was.

In short, while our modern courts have relaxed the original rule as to the assignability of the rights of actions, they have done so only to meet the requirements of commerce, and not to aid those whose sole purpose it is to speculate in lawsuits.

As might be supposed, present-day courts are, if anything, more careful than those of old to scrutinize the acts of attorneys at law, when those acts relate to the purchase of causes of actions or of the whole or part of the thing to be sued for.

The following cases will serve to illustrate the attitude of our modern courts toward speculative litigation:

Propeller Mohawk, 75 U. S., 153, 162;
Poe v. *Davis*, 29 Ala., 676;
Reece v. *Kyle*, 49 Ohio St., 475, 487;

Arden v. *Patterson*, 5 Johns Ch., 47;
Barker v. *Barker*, 14 Wisc., 131;
Case of The Clara A. M'Intyre, 94 Fed., 552;
Wilson v. *St. L. & W. Ry. Co.*, 120 Mo., 45;
Taylor v. *Perkins*, 171 Mo., App., 246;
Meloche v. *Deguire*, 34 Can. S. C., 24, 37;
Gammons v. *Johnson*, 76 Minn., 76;
Hoyt v. *Thompson*, 3 Sandf. S. C., 416, 429.

In *Propeller Mohawk*, 75 U. S., 162 (*supra*), the Supreme Court of the United States said:

> "The suit in the present case has been instituted by a volunteer, on a speculation; and we are not sorry that, upon the application of the principles of law governing it, the experiment must fail."

The action in that case was one brought upon a claim which had been wholly assigned to the speculator.

The answer presented, among others, the defence that the action savored of maintenance, as it appeared that the sum of $2,300 had been paid for the cause of action, which, if real, amounted to $20,000.

In *Poe* v. *Davis*, 29 Ala., 676 (*supra*), the plaintiff, the speculator, bought outright, for $100, certain land worth a thousand dollars.

One D. died intestate leaving the property in question. Thereafter a legatee propounded for probate a paper purporting to be D.'s last will. The probate was contested by the heirs-at-law of D. During the protracted litigation the plaintiff purchased the property from the daughter of D. The pretended will was finally rejected and the plaintiff brought an action against his vendor and the administrator of D., praying for a judgment declaring his assignment valid and obligatory.

In disposing of the matter, the Court said, page 660:

> "Although the modern decisions have relaxed the rigor of the law, as declared by the earlier adjudged cases, upon the subject of maintenance and champerty; yet that doctrine obtains, both in courts of law and equity, and is not confined to cases of purchases by persons occupying some fiduciary or confidential relation to the vendor. The doctrine is founded on principles of sound public policy, and is designed to check vexatious litigation, and to promote purity and efficiency in the administration of justice. *It is true* * * * *that the state of society, out of which the doctrine of maintenance originated, does not exist in this country.* * * * *But, in almost every community, there are officious, covetous persons, who, did the law allow it, would speculate in law-suits—who would watch their opportunity to find persons discouraged by some turn their cause may have taken, and, by promises of indemnity against costs and expenses, purchase for a trifling consideration the entire interest, or a part of the subject matter of the litigation, in the hope that, by bringing to bear the appliances of their command, they could succeed in the cause, or 'conquer a peace' by driving their adversary into a favorable compromise.* We may not have among us those 'great men' spoken of by Lord Coke (Co. Litt., 214-a), in consequence of whose purchase of pretended titles 'right might be trodden down and the weak oppressed,' *but so long as human nature remains as it is, theorise as we may, we must expect to find men whose cupidity will prompt them to risk a small sum for the prospect of acquiring a much greater;* and having incurred the risk, they will not be very scrupulous in the means to attain their end, or in avoiding, harassing and oppressing their opponents—men who are known never to abandon a case, so long as a court remains to which they can appeal, and who, by thus prolonging litigation, cause the ultimate success of their adversaries, in the superadded fees to counsel, etc., in many cases to be more disastrous than early defeat."

The Court then went on to decide that while the distributees may at law assign their interests in the estate to be distributed, the agreement in question, mainly because of its speculative feature, was a "species of maintenance," which, according to the better decisions, both ancient and modern, avoid the contract.

The Court then said:

> "The American cases fully recognize the doctrine of maintenance and champerty, as affecting civil contracts, whatever may be said of them in a criminal point of view. With us, champerty is the unlawful maintenance of a suit, in consideration of some bargain, to have a part of the thing in dispute, or some profit out of it; and covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered. *Holloway* v. *Lowe*, 7 Porter, 488."
> * * *

In *Arden* v. *Patterson*, 5 Johns. Ch., 47 (*supra*), Chancellor KENT said (pp. 47, 48):

> "*This was a purchase by an attorney, for a very small and inadequate consideration, of a matter in litigation, and for the very purpose of a renewed litigation.* It was a purchase by a person known to the other contracting party to be an attorney, and he knowing that the other contracting parties held the claim merely in trust for the benefit of creditors. The purchase was avowedly made as a matter of speculation, and at a time when this attorney knew, from previous disclosures made to him in his character of attorney, all the facts on which the foundation of the claim so purchase rested, and which created a belief in his mind that the value of the wine could be recovered. *Such a purchase, by such an officer, and under such circumstances, cannot be sustained.* It is champerty, for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law, as by the stat-

ute. * * * *The purchase of a lawsuit by an attorney, in a case like this, is champerty in its most odious form;* and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. *As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character, to speculate in lawsuits.* The precedent would tend to corrupt the profession, and produce lasting mischief to the community. The knowledge which led to this speculation was acquired by the defendant P., as the attorney of De Puyster, for De Puyster disclosed to him all the facts relative to his dealings with Arden, and which led to the deposit of the wine."

In the following case, too, the speculator purchased outright the subject matter in suit for a small consideration.

Barker v. *Barker*, 14 Wisc., 131 (*supra*), involved an action by Phoebe Barker for the partition of the real estate of which her husband died seized. The deceased left behind him his widow, Phoebe, and six children by her and Walter Barker and Angeline March, children by a former wife. Each of these children were entitled to one-eighth of the real estate. Phoebe had, prior to instituting the action, purchased the share of Walter Barker and Angeline March, but, the complaint alleged, they still pretend to have some interest in the premises.

The defendants in the suit were Phoebe's six children, Walter Barker and Angeline March and Anson Rogers, to whom Walter Barker and Angeline March had agreed to convey their respective shares, if recovered, in consideration of $100 each.

The substance of Rogers' defense was that Phoebe's purchase of the shares of Walter Barker and Angeline March had been effected by fraud.

The Court refused to entertain this defense upon the ground that the proofs showed it was prosecuted in pursuance of a *champertous* agreement.

The Court said (p. 142):

> "The strictness of the law relating to champerty and maintenance has been greatly relaxed, and with reason; yet it is still very generally recognized as an existing substantive part of the common law, and has been frequently enforced by the courts of this country (*Rust* v. *Larue*, 4 Litt., 411; *Brown* v. *Beauchamp*, 5 Mon., 413; *Hoyt* v. *Thompson*, 3 Sandf. S. C. Rep., 430; *Arden* v. *Patterson*, 5 Johns. Ch. Rep., 44; *Thompson* v. *Warren & Wife*, 8 B. Mon., 488; *Lathrop* v. *Amherst Bank*, 9 Met., 489)."

* * * * * * *

Page 145:

> "For whatever reason there may have been for modifying the ancient strictness of the law on this subject, we are not prepared to admit that the law itself should be entirely abrogated. For there is undoubtedly a class of persons constantly engaged in prying into old rights and titles, for the purpose of discovering defects which would soon have been hidden forever under the dust of prescription, that they may buy out the interests of the original owners and litigate upon *speculation*. We think the encouragement of this practice is against public policy, and that when it assumes the form of a *champterous* agreement, courts should decline to enforce it."

In another case the speculator bargained to purchase the entire thing in litigation without paying a fair consideration.

In *The Clara A. M'Intyre* case, 94 F., 552, 556, the Court said:

> "It was insisted in the argument that the contract under which the intervenor, C. R. Johnson,

> claims to hold the note and mortgage is champertous, hence void, and he has no standing in court * * * Champerty—a bargain to divide the thing sued for, whereupon the champertor is to carry on the suit at his own expense, purchasing a suit or right to sue—was so much abhorred at the common law that a chose in action was not assignable. Champertors are spoken of as pests of society, who were perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering with other men's quarrels. * * * Johnson is a stranger, having no interest, direct or remote, as far as the evidence discloses, in the controversy. He secures by assignment, *without paying a nominal consideration*, on an agreement to pay expenses and divide what he recovers, a claim which the holders are not willing to prosecute. * * * *The only apparent motive is to speculate in stale claims, and interfere in other men's business. It is almost universally held the courts will not give effect to such contracts.*"

Wilson v. *The St. L. & W. Ry. Co.*, 120 Mo., 45, involved a suit by a judgment creditor of the railroad company brought to recover from certain stockholders the par value of their stock, which, it was alleged, was issued to and accepted by them but not paid for.

The plaintiff was not an actual creditor, but had merely received from others the assignment of certain judgments against the railroad company, and *had not paid any valuable consideration therefor.*

The Court said, at pp. 57-58:

> "We are satisfied that this whole proceeding is a mere speculation on the liability of these defendants, * * * and that plaintiff is a mere volunteer without substantial or equitable right."

* * * * * * *

> "An assignment which violates the policy of the law against champerty and maintenance, as operating merely to procure or promote litigation, will not be permitted by a court of equity, even though it may not amount strictly to the criminal offence of champerty or maintenance" (3 Pomeroy's Eq. Jurisprudence [2nd Ed.], sec. 1276).

Then, quoting from the case of *Hospes* v. *Mfg. Co.*, 48 Minn., 174, the Court continued, on pp. 58-59:

> "And again the court says, after stating that the purchase had been made after the insolvency of the company, and after it was in the hands of a receiver: 'If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for.'"

The facts in *Hoyt* v. *Thompson*, 3 Sandf. S. C., 416, 429 (*supra*), are: The Long Island R. R. Company owed the Morris Canal Company, $40,000, which debt was secured by a mortgage executed by the railroad company.

The Morris Canal Company in turn was indebted to the State of Michigan, and transferred, while insolvent, to that State the debt due it by the railroad company and the mortgage.

Subsequently the State of Michigan transferred the railroad company's debt and mortgage to one Thompson.

Thereafter a New Jersey firm recovered a judgment of about $40,000 against the Morris Canal Company and thereupon caused receivers to be appointed of all that company's property.

Three years after Hoyt, the plaintiff, purchased the judgment recovered by the New Jersey firm and pursuant to an order of court the receivers of the Morris Canal Company assigned to Hoyt the debt due that company by the railroad company.

The defendants, Thompson and the railroad company, demurred to bill brought by Hoyt, who claimed to be the owner of the debt.

The Court said to this claim:

> "And our examination of the subject compels us to say, that without departing from the law as it has long been settled, we cannot, as a court of equity, give effect to such an assignment, or lend our aid in any manner to a person claiming under it. Such a person has not a *locus standi in judicio*. The assignment of a debt, under such circumstances, is the transfer of a law suit, to be prosecuted by the assignee at his own expense, and the sale of the disputed title by a party out of possession. It is therefore illegal and void, as involving, and that in an aggravated form, the offences of both maintenance and champerty."

In *Taylor* v. *Perkins*, 171 Mo. App., 246 (*supra*), the Court said, 254:

> "But where sordid gain is the contractual motive, the ties of blood and of charity and friendship are succeeded by selfishness, and what would have been humane maintenance becomes unlawful champerty."

In *Meloche* v. *Deguire*, 34 Can. S. C., 24, 37 (*supra*), the Court said:

> "Maintenance is lawful under certain circumstances, but maintenance in consideration of an interest in the subject matter of the action to be maintained cannot receive the sanction of a court of justice. Any one for instance even not interested at all, may, if he acts only from philanthropic motives lawfully give money to a poor man to enable him to carry on a suit; but the stipulation on his part that if the poor man succeeds he will share in the proceeds, is prohibited and illegal as champertous."

In *Gammons* v. *Johnson*, 76 Minn., 76, 83, the Court said:

> "The common law has been changed in this state to the extent of allowing an attorney to take a case for a contingent fee, or for a share of the amount recovered, and, in my opinion, it is right that the law should be so changed. * * *
>
> But permitting attorneys to share in the proceeds of the litigation tends strongly to abuses of various kinds, and this tendency to abuse should be closely watched by the courts. It is somewhat unprofessional for an attorney to solicit employment at all, more especially so when he expects to take the CASE 'ON shares'; and it is still more unprofessional for him to solicit employment in a case which he expects to take 'on shares,' and which he has good reason to believe would never be brought at all, were it not for his solicitation."

The authorities cited clearly establish the following principles:

I. That speculation in law suits, from time immemorial, has been condemned by all courts as against public policy.

(a). That at common law such speculation is held to be *maintenance* when the *whole* of a cause of action or thing to be sued for is purchased by a stranger *for an inadequate consideration;* and this especially so when it appears from the nature of the transaction that in order to derive any benefit from the purchase the stranger must necessarily institute the action.

(b). That likewise such speculation is held to be *champerty* at common law when a suit of another is maintained in consideration of some bargain to have *part* of the thing in dispute or some profit out of it.

II. That the common law doctrine of maintenance is applied with greater stringency when the pur-

chaser or assignee of the right of action or of the thing to be sued for is an attorney at law.

In none of the reported decisions of the Ohio Courts on this subject has anything been said which is at variance with the principles enunciated above.

The following cases hold that a speculative contract for part of a claim in suit and to pay costs and expenses is champertous.

Wintermute v. *Humphrey*, 1 Ohio Dec. R., 439;
Penn. Co. v. *Lombardo*, 49 Ohio St., 1;
Ong v. *Worden*, 55 Ohio St., 695;
Blunk v. *McDonald*, 18 Ohio D. N. P., 109.

The cases below hold that where, in addition to a speculative contract for part of the thing in suit, there is a stipulation preventing the owner of the right of action from settling or compromising the suit, the transaction is doubly odious and champertous.

Enslie v. *Ford*, 1 Ohio C. C. (N. S.), 603;
Key v. *Vattier*, 1 Ohio, 58;
Lewis v. *Lewis*, 15 Ohio, 175;
Stewart v. *Welch*, 41 Ohio St., 483, 484, 503;
Davy v. *Insurance Co.*, 78 Ohio St., 256, 267.

In the following case it was held that a transfer of the whole claim to an attorney, as assignee, for the purpose of collection was champertous, the assignee having a contingent fee, depending on success, to be deducted from the proceeds of the suit, which suit is to be brought in his own name, at his own expense, and over which the assignors are to have no control.

Brown v. *Ginn*, 66 Ohio St., 316.

The cases of *Railway Co.* v. *Volkert*, 58 Ohio St., 362; *Healy* v. *Robinson*, 11 O. N. P. (N. S.), 329; *Hall* v. *Ashby*, 9 Ohio, 96, and *Cresinger* v. *Welch*, 15 Ohio, 156, likewise are not at variance with the principles stated above.

Railway Co. v. *Volkert*, 58 Ohio St., 362 (*supra*), involved in substance the determination of whether an agreement entered into between an attorney and his client, which provided simply that the attorney agreed to represent his client for one-half of any judgment which might be obtained in the suit, was champertous.

The judgment rendered amounted to $3,500.

The Court first stated the three elements constituting the offence of champerty to be, page 372:

> "1st. And this is common to all forms of maintenance, the absence of any other interest in the case on the part of the champertor than that arising from his champertous contract.
>
> 2nd. The assumption by the champertor of all expenses in conducting the case.
>
> 3rd. A previous agreement for his remuneration from the proceeds of the suit."

And then concluded:

> "If this rule were applied, it would not destroy the contract * * * for Muller (the attorney) made no agreement with respect to any of the expenses of the suit."

In *Healy* v. *Robinson*, 11 O. N. P. (N. S.), 329, the Court held the contract of retainer valid because it appeared to have been entered into voluntarily and at the client's solicitation and because, while it provided that the attorney was to receive a share of the fund to be derived from the suit, the client agreed to pay all cost and expenses.

The transactions in both of those cases were devoid of the element of speculation.

Hall v. *Ashby*, 9 Ohio, 96, 99, though it mentions champerty, involved merely the question of whether a deed of release, which is a substantive mode of conveyance in Ohio, effectually transferred title to land notwithstanding it was in adverse possession at the time of execution of the deed.

The Court held that the English statute 32d H. 8, which prohibited such a practice under penalty of forfeiting the whole land,—did not prevail in Ohio.

Cresinger v. *Welch*, 15 Ohio, 156, involved a similar question to the one in *Hall* v. *Ashby*. Here too the defendant sought a ruling to the effect that a purchase of land from a person not in possession is an act illegal and void because of champerty and maintenance.

The Court adverted to the old English rule, page 190:

> "In many, probably most of the States in this Union, the same principle (the old English rule) prevails; but in this State the decisions have, from the earliest period of our judicial history, been different, and such sales and conveyances have been held to be valid."

In both of the above cases the speculative element was lacking.

Reece v. *Kyle*, 49 O. St., 475, which of all Ohio decisions presents the most modern view of what is to be considered champertous conduct on the part of an attorney, involved an agreement between client and counsel by which, in consideration of an assignment to the attorney of a judgment obtained by him for the client, the attorney agreed to render legal services in an effort to collect the judgment, to advance costs and expenses in the first instance, one-half to be repaid by the client in

case of failure, and the net proceeds of the judgment, in case of success, to be equally divided between them.

While the Court held the contract valid and not champertous, it is to be noticed that no question was raised as to the speculativeness of the transaction. In fact, we are not even told what the proportion was between the consideration advanced by the attorney and the share of the judgment he was to receive as a fee. It is certain, however, that had there been, as here, a gross disproportion between those amounts, which would have led the Court to believe that Reece had purchased the judgment on a speculation, his suit would have been dismissed, for the Court stated, at page 487;

> "The conduct of attorneys is subject to proper scrutiny by the courts. The maintenance of a high character for dignity and integrity on their part, is essential to the security of community, and the true administration of justice. Any infraction of the letter of this statute (penal statute of February 10, 1824), would entail its penal consequences upon an offending attorney, and the courts would not hesitate to hold void any contract violative of its spirit, whether coming within the strict letter or not. So, too, *the courts have been, and continue to be careful not to sanction contracts which appear to encourage a gambling spirit, one leading to the prosecution of pretended or obsolete claims, for a possible high reward.*"

So that we see in Ohio, as everywhere else where the common law doctrine of maintenance and champerty prevails, the Courts "continue to be careful not to sanction contracts which appear to encourage a gambling spirit."

The cases above furnish a complete answer to the plaintiff's contention, that the Trial Court erred in urging, in support of its findings that the plaintiff bought the Lake Shore Company's claim on a speculation, the

gross inadequacy between the sum of $5,000 paid by the plaintiff for it and $750,000, the alleged value of that claim.

According to those authoritites, both old and modern, the inadequacy of the consideration paid for an assignment of a claim has a direct bearing upon the question of whether the assignment is maintenous.

Further, it is apparent from those cases that it makes no difference whether the claim trafficked in is a valid claim or is a doubtful one, if it is purchased "at an under rate."

The plaintiff attempts to show that his assignment of the Lake Shore Company's cause of action is not champertous, either at common law or according to the law of Ohio or of that of New York.

Even if this were so, the defendants, as previously stated, would still be entitled to an affirmance of the judgment herein, as it plainly appears that that assignment is maintenous.

It is submitted, however, that the plaintiff's assignment is champertous, as well as being tainted with maintenance.

The basic facts in *Hoyt* v. *Thompson*, 3 Sandford S. C., 416-429 (*supra*), are identical with those of the case at bar. There, too, a stranger to the suit purchased outright a disputed claim and prosecuted the action at his own expense and the Court held the transaction involved not only the offense of maintenance, but that of champerty as well.

The plaintiff-in-error contends that it makes no difference whether the purchase of a contested claim with intent to sue thereon is made by an attorney from his client or is purchased by a layman and it is said that in the case at bar any fraud or imposition on the client is wanting.

The facts clearly show that the plaintiff acquired

knowledge of the existence of the claim he attempted to buy only while acting in his professional capacity.

It shows that the claim is made by an attorney who, although he knew that his client was without funds to avail itself of the alleged cause of action, drove so hard and oppressive a bargain with his client that he stripped it of every vestige of interest in its claim to satisfy his unpaid bill for services, which his client was then without means to pay.

As consideration for the extinguishment of this uncollectible claim of $5,000 against his client, he attempted to divest his client of a property right which he estimated to be worth at least $75,000 and which he subsequently sought to capitalize, first at $303,000 and then at $750,000.

There was no effort or apparent desire on his part to save anything for his client, no willingness to enable it to recoup any damage it had sustained or to allow it to participate to the slightest extent in the fruits of his prospective recovery.

The lawful contingent fee agreement which was open and available to him, at least to the extent of the reasonable value of his services, was not sufficiently remunerative. The plaintiff's estimate of the value of the claim and of his services shows that neither has the slightest relation to the other.

In view of these facts, it can hardly be claimed that the case is entirely free from just criticism.

The plaintiff inquires as to whether there is any general policy of the law growing out of the relation between attorney and client which, under the evidence in this case, invalidates the attempted transfer of the cause of action from the client to the attorney (Brief, p. 43), and it is said (Brief, pp. 47, 48), that if such a policy existed, it would amount to saying, "that if the wrongdoer does a small damage the claim is assignable because in that

event the purchase of a claim is not speculative, but if the damage and the difficulty of establishing its amount are great, then the purchase is void because, in that event, speculative. So that the greater the wrong and damage, the greater the immunity from making reparation."

The argument that the greater the wrong the greater the immunity from prosecution is palpably fallacious.

A legitimate contingent fee agreement affords the protection to indigent litigants which primarily induces courts to sanction it and the statutes which permit indigent litigants to sue *in forma pauperis* demonstrate that no attorney is required to purchase the contested claims of his client lest a miscarriage of justice should result through his client's inability to finance the litigation.

Even when applied to this case the statement that the greater the wrong the greater the immunity from suit is plainly inaccurate and incorrect.

Here, the greater the damages recoverable, the less the client receives, but there is on that account no immunity from or cessation of litigation.

On the contrary, litigation has been active, continuous and varied.

General Film Co. v. *Sampliner*, 232 Fed., 95 (Bill for Discovery in Ohio);

Sampliner v. *Motion Picture Patents Co. et al.* (243 Fed., 277), Dist. Court of N. Y. (aff'd. 259 Fed., 152);

General Film Co. v. *Sampliner*, 252 Fed., 443 (6th C. C. A., affirming District Court's dismissal of General Film Co.'s bill to enjoin prosecution of Sampliner's action in Ohio);

Sampliner v. *General Film Co.* (still pending undisposed of in Northern Dist. of Ohio).

It is not surprising under the circumstances disclosed by this record, that the learned Trial Judge granted the defendants' motion for a direction.

It is surprising that the plaintiff-in-error can assert in this Court that the "defendants failed to produce any substantial evidence in support of the defense of the illegality of the assignment and the Trial Court should have directed a verdict for the plaintiff on this issue."

We think that there was not only some substantial evidence to support this contention, which is all the law requires to support the verdict, but that the essential elements of champerty and maintenance and the consequent invalidity of the plaintiff's title to the cause of action asserted were conclusively established

We now approach the discussion of plaintiff's second "fundamental exception," namely:

> (2) If there were any questions of fact to be decided, or divergent inferences of fact to be made, the District Court erred in not submitting them to the jury.

Plaintiff still asserts that there were no questions of fact to submit to the jury. The premise of his first contention—that he was entitled to a direction of a verdict in his own favor because there was no substantial evidence of the invalidity of his title, demonstrates this to be so.

It is, of course, well settled that where each party to an action requests the Court to instruct a verdict in its favor it is equivalent to a request for a finding of fact,

and if the Court directs the jury to find a verdict for one of them, both are concluded on the facts so found.

Beuttele v. *Magone,* 157 U. S., 154;
Bradley Timber Co. v. *White,* 121 Fed., 779;
McCormick v. *National City Bank of Waco,* 142 Fed., 132;
Empire State Cattle Co. v. *R. R. Co.,* 147 Fed., 457;
Bankers' Mut. Casualty Co. v. *State Bank of Goffs,* 150 Fed., 78.

In *Bradley Timber Co.* v. *White,* 121 Fed., 779 (*supra*), the Court said, at page 784:

> "The remaining assignments of error complain of the peremptory charge in favor of the petitioners and the refusal of the peremptory charge in favor of the defendant. As to this matter, it seems to be settled that, where each party asks the court to instruct a verdict in its favor, it is equivalent to a request for a finding of facts, and, if the court directs the jury to find a verdict for one of them, both are concluded on the findings of facts."

Hence, when a case in which such a request is made comes before an appellate court, that court may only review the questions of law presented and must affirm if there be any evidence in support thereof.

Beuttele v. *Magone,* 157 U. S., 154.

In the above case, Mr. Justice WHITE, delivering the opinion of the Supreme Court of the United States, at page 157:

> "The request, made to the court by each party to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the

> case to the court, without the intervention of a jury, within the intendment of Rev. Stat. Secs. 649, 700. As, however, both parties asked the court to instruct a verdict, both affirm that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the findings made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof, *Lehnen* v. *Dixon*, 148 U. S., 71; *Runkle* v. *Burnham*, 153 U. S., 216."

The only exception to this rule is where a party, after his request for a peremptory instruction has been refused, insists by appropriate requests upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent.

> *Empire State Cattle Co.* v. *Railroad Co.*, 147 Fed., 457.

In this case both the defendants and the plaintiff moved for a directed verdict in their favor (R., fol. 1209). After they had done so, and the Court was obviously about to grant the motion in favor of the defendants, the following colloquy took place between the Court and plaintiff's counsel (R., pp. 304-5):

> "Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict, I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.

The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

Mr. Seabury: I think he should specify and not put a hypothetical motion.

The Court: I cannot have any 'if's. If you think under Section 973 of the Code, the Court has any right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to the question of practice, but to the substantive questions in the case.

Mr. Rogers: Then, your Honor, may I state my position on the record?

The Court: Yes, certainly.

Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the court.

My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon,

and whether the assignment to him was bona fide for an antecedent indebtedness.

The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule.

Mr. Rogers: *Then* I move for a direction, your Honor, for the plaintiff, upon the issue framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation."

Thus the plaintiff's counsel unequivocally abandoned even his conditional motion for leave to go to the jury "if there were any disputed issues of fact."

After the Court had granted the defendants' motion plaintiff's counsel failed to ask to go to the jury on any issue of fact. He simply said (R., p. 310):

> "Mr. Rogers: I except to the direction and I also except to your Honor's refusal to allow the case to go to the jury on the questions of fact, if any there be."

Thus, the learned counsel for the plaintiff below not only expressly asserted before the Trial Court that there were no questions of fact to be submitted to the jury, but when the Court said that it could not take conditional offers and that "counsel is at liberty, if so advised, to

request to go to the jury * * *" (Record, p. 253), instead of asking even conditionally to go to the jury, counsel said, "Then I move for a direction * * *."

Thus, he not only abandoned his previous position "that if there were any disputed issues of fact " he wanted them submitted to the jury, but he moved for a direction, which motion, until followed by one for leave to go to the jury on specified issues of fact, concedes that there is no issue of fact in the case.

Besides, as the learned Circuit Court of Appeals pointed out, if plaintiff's counsel could not state what issues of fact remained for submission to the jury, the Trial Court could not be expected to see and recognize issues of fact which counsel not only is unable to discover, but which he positively states do not exist.

Even in this Court the learned counsel for the plaintiff still presents the hypothetical contention that "if there were any questions of fact" they should have been submitted to the jury, without assuming to specify any of these supposed issues.

In reality, it is obvious that no such issues of fact exist.

As the Court said in *Empire State Cattle Co.* v. *Atchison Ry. Co.*, 210 U. S., 1-10:

> "The correctness therefore of the action of the Court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the Court in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of this Court to set aside the verdict if the cases had been given to

the jury and verdicts returned in favor of the plaintiff."

McGuire v. *Blount*, 199 U. S., 142, 148 and cases cited;

Marande v. *Texas & P. R. Co.*, 184 U. S., 191 and cases cited;

Southern Pacific Co. v. *Pool*, 160 U. S., 438 and cases cited.

POINT III.

It follows from what has been said that the judgment of the Court was right and should be affirmed.

Respectfully submitted,

SAMUEL SEABURY,
WILLIAM M. SEABURY,
Attorneys for Vitagraph Company of America, Albert E. Smith;

ROBERT H. McCARTER,
Attorney for Thos. A. Edison, Inc., Frank L. Dyer and Harry N. Marvin;

CHARLES F. KINGSLEY,
Attorney for Motion Picture Patents Company, Biograph Company, Jeremiah J. Kennedy, William Pelzer and Percival L. Waters;

HOWARD THAYER KINGSBURY,
CHARLES B. SAMUELS,
Attorneys for Pathe Freres, and Jacques A. Berst;

ALFRED P. W. SEAMAN,
Attorney for Kalem Company.

THE case is stated in the opinion.

Mr. John G. White, with whom *Mr. Austin V. Cannon* was on the brief, for plaintiff in error.

Mr. Samuel Seabury, with whom *Mr. William M. Seabury*, *Mr. Robert H. McCarter*, *Mr. Charles F. Kingsley*, *Mr. Howard Thayer Kingsbury*, *Mr. Charles B. Samuels* and *Mr. Alfred P. W. Seaman* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The opinion below is reported in 255 Fed. Rep. 242.

By an assignment executed in Ohio December 28, 1911, the Lake Shore Film and Supply Company, a corporation of that State, undertook to convey to plaintiff in error its claim and right of action against defendants for damages resulting from their violations of the Sherman Act. Relying upon the assignment he brought suit for $750,000 January 16, 1917, in the United States District Court, Southern District of New York. The defendants denied liability, and set up the following as a separate and distinct defense:

"The plaintiff is and at the time of his alleged purchase of the claims in controversy, set up in the complaint herein, was an attorney and counsellor-at-law of the State of Ohio, practicing as such before the Courts of that State. . . . That at the time of said alleged purchase, it was, and is now, the law of the State of Ohio, that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such demand by such pur-

chase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the State of New York. . . . That the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon."

All parties agreeing, the court directed a separate trial before a jury upon the issues of fact and law arising under the special defense. Plaintiff in error testified in his own behalf and called two other witnesses—none were called by the defendants. The essential facts as well stated by the Circuit Court of Appeals follow:

"The assignment states that—'For value received the Lake Shore . . . Company . . . hereby sells, assigns, and transfers to J. H. Sampliner all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement by and between the Motion Picture Patents Company; . . . all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore . . . Company, and contrary to and in violation of the Sherman Anti-Trust Act. . . .'

"The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants, and that those services extended over a period from July, 1910, to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the president of the Lake Shore Company whether he would be willing to bring suit against the defendants,

and that he replied that he would bring the suit, being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily, and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him, and replied in the neighborhood of $9,000 or $10,000. He was told the company did not have the money and could not pay him, and thereupon he said that, if the company would pay him $5,000 in cash, he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment, and was told that the board of directors wanted to know whether, if they made an assignment, the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties with the defendants. He agreed to do this, and the assignment was executed.

"It appears, therefore, that the assignment originated, not with the plaintiff, but with the Lake Shore Company, and that the consideration for the agreement involved the payment of a past indebtedness, as well as for future services of a professional character. It is also to be noted that the invalidity of the assignment is set up, not by the client, the assignor, who has at no time sought to repudiate it, but by third parties, between whom and the plaintiff no fiduciary relations have existed."

At the conclusion of the evidence the defendants asked a directed verdict "on the ground that the plaintiff has

not shown title to this cause of action; on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void." Thereupon the following occurred—Mr. Rogers representing the plaintiff:

"Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.

"The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

"Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

"The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

"Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

"Mr. Seabury: I think he should specify and not put a hypothetical motion.

"The Court: I cannot have any 'ifs.' If you think under Section 973 of the Code, the Court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to

the question of practice, but to the substantive questions in the case.

"Mr. Rogers: Then, your Honor, may I state my position on the record?

"The Court: Yes, certainly.

"Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

"My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was *bona fide* for an antecedent indebtedness.

"The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule.

"Mr. Rogers: Then I move for a direction, your Honor, for the plaintiff, upon the issue framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

"The Court: Both sides having moved for a direction

of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

"I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors."

A verdict for the defendants was directed and judgment entered thereon. The Circuit Court of Appeals declared itself concluded by the trial court's finding "that the plaintiff purchased this cause of action with intent to sue thereon," and held: "We must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt, but that he purchased it for the purpose of suing upon it; that he, an attorney at law, purchased from his client for $5,000 a cause of action which he values at $750,000. The question we must answer, therefore, is whether the law sanctions such a transaction between parties standing in the confidential relation of attorney and client. We are satisfied that the common law does not sanction it."

Among other things counsel for plaintiff in error now insist that "if there were any questions of fact to be decided or divergent inferences of fact to be made the District Court erred in not submitting them to the jury." The point is well taken.

Statements by plaintiff's counsel made it sufficiently plain that while he sought an instructed verdict he also requested to go to the jury if the court held a contrary view concerning the evidence. In the circumstances disclosed we think the request was adequate and timely under former opinions of this court. *Empire State Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1, 8; *Sena* v. *American Turquoise Co.*, 220 U. S. 497, 501; *Schmidt* v. *Bank of Commerce*, 234 U. S. 64, 66; *Williams* v. *Vreeland*, 250 U. S. 295, 298. It should have been granted. Clearly some substantial evidence strongly

SAMPLINER *v.* MOTION PICTURE PATENTS COMPANY ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 89. Argued November 12, 1920.—Decided December 6, 1920.

A party who joins the opposing party in requesting the District Court to instruct peremptorily upon the ground that the evidence entitles him to a verdict as a matter of law, may reserve his right to go to the jury if the court should regard the facts as disputed; and where such reservation is properly made, the court cannot ignore it and assume to find the facts from the evidence as though the case had been unconditionally submitted. P. 239.

Held, that adequate and timely reservation of the right was made in this case.

255 Fed. Rep. 242, reversed.

tended to show that the assignment was taken in extinguishment of an existing indebtedness and not for mere speculation upon the outcome of intended litigation.

The judgment below must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.